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The Hon'ble Mr. Justice Lindsay.

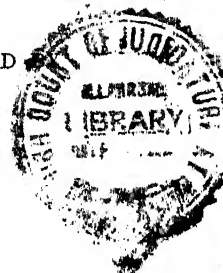


THE INDIAN LAW REPORTS

ALLAHABAD SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.



REPORTED BY :

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High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*
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JUDGES OF THE HIGH COURT OF JUDICATURE
AT ALLAHABAD.

1926.

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The Hon'ble SIR GRIMWOOD MEARS, KT.

(On deputation from 12th July).

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(Officiated from 15th July).

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(Leave combined with vacation from 15th April).

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(Retired from 17th July).

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(Leave from 18th October).

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(Officiated from 26th April).

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(Took his seat from 11th October).

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TABLE OF THE NAMES OF CASES REPORTED IN THIS VOLUME.

PRIVY COUNCIL.

	Page.
Bhagwan Singh v. Allahabad Bank, Limited ...	763
Jawahir Singh v. Udai Prakash ...	152
Lakhmi Chand v. Anandi ...	313
Masit-ullah v. Damodar Prasad ...	518
Nirman Singh v. Lal Rudra Pratab Narain Singh ...	529
Pancham v. Ansar Husain ...	457
Ram Charan Lonia v. Bhagwan Das ...	443

HIGH COURT.

Abdul Ali Khan v. Muhammad Ismail ...	548
Abdul Hasan, Jauhar. <i>In re</i> — ...	711
Abdullah v. Badr-ul-Islam ...	233
Agha Haidar v. The City Board, Mussoorie ...	678
Agha Husain v. Qasim Ali ...	94
Ahmad Husain Khan v. Hardayal ...	199
Ahmad Husain v. Muhammad Qasim Khan ...	171
Allah Bakhsh v. Karim Bakhsh ...	818
Allahabad Bank, Ltd. v. Bhagwan Das Johari ...	343
Babu Lal v. Janak Dulari ...	429
Bachan Singh v. Bijai Singh ...	221
Facbhan v. The Municipal Board of Mirzapur ...	412
Badri Prasad v. Chokhe Lal ...	510
Ballabh Das v. Murat Narain Singh ...	385
Balwant Singh v. Sarabjit ...	774
Bans Bahadur Rai v. Chitra Kut Rai ...	643
Bechan v. Raghunath ...	224
Bhagwati Dayal v. Dhan Kunwar ...	329
Bhajan Lal v. Kedar Nath ...	696
Bhakta Shiromani v. Sital Nath ...	31
Bakhtawar v. Sundar Lal ...	213
Bijai Indar Singh v. Charan Singh ...	482
Bijai Saran Sahai v. Raghunath Prasad Sahai ...	698
Binda v. Mangala ...	661
Binda Prasad v. Raj Ballabh Sahai ...	245
Bindraban v. The Great Indian Peninsula Railway Company ...	766
Bishnath Singh v. Basdeo Singh ...	67
Bisheshar Prasad Pande v. Raghubir ...	163

	Page.
Brij Raj v. Ram Sarup	44
Browne v. Pearce	72
Chandler and Co., Ltd. In the matter of—	580
Chhotey Lal v. Girraj Kishore	332
Chitar Mal v. Panchu Lal	348
Collector of Bareilly v. Sultan Ahmad Khan	498
Collector of Moradabad v. Muhammad Hidayat Ali Khan	554
Chunni Singh v. Lakshpat Singh	489
Churya v. Baneshwar	334
Darshan Das v. Bikramajit Rai	81
Daulat Singh v. Maharaj Raja Ramji	362
Debi Bakhsh v. Shambhu Dayal, Ganga Prasad	281
Deoraj v. Munshi Ram	622
Dip Prakash v. Bohra Dwarka Prasad	291
Durga Bai. In the matter of—	300
Durga Das v. Nawab Ali Khan	557
Dwarka Singh v. Sheo Shankar Singh	810
Emperor v. Bhagwat Singh	501
Emperor v. Deoki Koeri	496
Emperor v. Faujdar Mahto	236
Emperor v. Gunna	687
Emperor v. Indar Singh	288
Emperor v. Jalal-ud-din	264
Emperor v. Kalwa	409
Emperor v. Kamla Pat	368
Emperor v. Kamlapati Panth	23
Emperor v. Mahtab Rai	603
Emperor v. Mewa Ram	208
Emperor v. Panna Lal	220
Emperor v. Rafi-uz-Zaman Khan	325
Emperor v. Ram Harakh Pathak	140
Emperor v. Ram Sarup	230
Emperor v. Sheoraj Singh	375
Faqir Chand v. Sant Lal	4
Fateh Singh v. Gopal Narain Singh	88
Fatima-ul-Hasna v. Baldeo Sahai	186
Gangadhar, Baijnath v. Bombay, Baroda and Central India Railway	342
Gokul Das v. Nathu	310
Gokul Kalwar v. Chandar Sekhar	611
Gopal Das v. Baij Nath	239
Goshain v. Purn Singh	588
Gulab Dei v. The Great Indian Peninsula Railway	217
Haji Sultan v. Masitu	689
Harihar Dat v. Maqsud Ali	166
Hari Chand Rai v. Moti Ram	414

TABLE OF CASES REPORTED.

iii

	Page.
Harnand Lal v. Chaturbhuj	356
Het Ram v. Raja Dutt Prasad Singh	682
Ishwari Prasad v. Sheotahal Rai	684
Jado Singh v. Nathu Singh	592
Jagannath Prasad v. Jugal Kishore	9
Jagrup Singh v. Indrasan Pande	347
Jai Narain v. Jafar Beg	353
Jangi Lal v. Mata Badal Singh	392
Jogamaya Dasi v. Tulsa	12
Jwala Prasad v. Mohan Lal	705
Kanhaiya Lal v. Bhagwan	60
Kashi Prasad v. Mathura Prasad	6
Kehri Singh v. Thirpal	104
Kekri Press Company, Limited. In the matter of the—	709
Kishan Dei v. Sheo Paltan	126
Laiq Singh v. Jagdish Singh	815
Lal Bahadur Lal v. Kamleshar Nath	183
Lallan Misir v. Ram Richcha	258
Lalta Prasad v. Jagdish Narain	787
Mahadeo Pande v. Somnath Pande	828
Mahadeo Sahu v. Sarju Prasad Tiwari	153
Mahmud-un-nissa v. Barkat-ullah	666
Mahtab Singh v. Hub Lal	630
Makundi Singh v. Parbhu Dayal	97
Maro v. Hanso	485
Mewa Ram v. Ram Gopal	395
Mewa Ram v. Ram Gopal	735
Mohsham Ali Khan v. Mulu	551
Moti Chand v. Kunwar Kalika Nand Singh	663
Moti Shah v. Gandharp Singh	687
Muhamdi Begam v. Tufail Hasan	17
Muhammad Ibrahim v. Ram Chandra	272
Muhammad Shafiq-ullah v. Nuh-ullah Khan	58
Muhammad Zakaria v. Kishan Narain	260
Mulchand, Nemi Chand v. Basdeo Ram Sapru	404
Mulraj v. Indar Singh	150
Municipal Board of Benares v. Bihari Lal	560
Munni Lal v. Shiana Sonarin	670
Mutsaddi v. Bhagwan Das	164
Nageshar Rai v. Nand Lal	70
Nand Kishore v. Badan Singh	568
Nand Lal Saran v. Dharm Kirti Saran	377
Narain Das v. Ram Chandar	209
Narain Das v. Sheo Din	251
Nathu Lal v. Raghubir Singh	160

	Page.
Nawasi Begam <i>v.</i> Dilafroz Begam ...	803
Om Prakash <i>v.</i> Moti Ram ...	400
Parabhans Pande <i>v.</i> Sheodarshan Singh ...	397
Prem Bihari Lal <i>v.</i> Billimoria and Co. ...	503
Qudrat-un-nissa <i>v.</i> Abdul Rashid ...	616
Radha Kishan <i>v.</i> Kashi Nath ...	276
Rahima Bibi <i>v.</i> Fazil ...	834
Raj Bahadur <i>v.</i> Narain Prasad ...	422
Raja Ram <i>v.</i> Chadammi Lal ...	574
Ram Devi <i>v.</i> Ganeshi Lal ...	465
Ram Kali <i>v.</i> Gopal Dei ...	648
Ram Kunwar <i>v.</i> Govind Ram ...	145
Ram Sahai <i>v.</i> Madan Lal, Kanhaiya Lal ...	432
Ram Saran Das <i>v.</i> Girdhari Lal ...	286
Ram Sarup <i>v.</i> Gaya Prasad ...	175
Ranjit Singh <i>v.</i> Bhagwati Singh ...	491
Secretary of State for India in Council <i>v.</i> U. P. Glass Works ...	584
Shankar Ban <i>v.</i> Ram Dei ...	493
Sheo Darshan Singh <i>v.</i> Beni Chaudhri ...	425
Sheo Prasad <i>v.</i> Naraini Bai ...	468
Sheoram Singh <i>v.</i> Babu Singh ...	302
Shiam Lal <i>v.</i> Radha Fallabh ...	84
Shib Narain <i>v.</i> Gajadhar ...	292
Shiva Nath Prasad <i>v.</i> Tulshi Ram ...	1
Sibt Muhammad <i>v.</i> Muhammad Hameed ...	625
Skippers and Company, Limited <i>v.</i> E. V. David ...	821
Sultan Begam <i>v.</i> Sarvi Begam ...	121
Suraj Singh <i>v.</i> Phul Kumari ...	226
Tajammul Husain <i>v.</i> Banwari Lal ...	77
Tejo Bibi <i>v.</i> Sri Thakur Murlidhar Raj Rajeshwari ...	671
Vakil. In the matter of a— ...	542
Zahur Ahmad <i>v.</i> Taslim-un-nissa ...	27
Zorawar Singh <i>v.</i> Bhagwan Singh ...	19

TABLE OF CASES CITED.

A

	Page.
Abdul Gani v. Emperor, 30 Indian Cases, 441, referred to ...	63
Abdul Ghafur v. Ghulam Husain, I. L. R., 35 All., 296, referred to ...	692
Abdul Karim v. Ram Kishore, I. L. R., 47 All., 421, referred to ...	3
Aga Mahomed Jaffer Bindanim v. Koolsom Beebee, I.L.R., 25 Calc., 9, referred to ...	558
Ahmad-ullah Khan v. Murli, 5 A. L. J., 128, referred to ...	106, 109
Ajudhia Prasad v. Badar-ul-Husain, I. L. R., 39 All., 289, referred to ...	240
Alderson v. White, 2 De Gex and J., 97, referred to ...	803
Amina Bibi v. Ram Shankar Misra, I. L. R., 41 All., 473, referred to ...	423
Ammar v. Govind, I. L. R., 47 All., 616, referred to ...	779
Amrit Lal Seal v. Jagat Chandra Thakur, I. L. R., 4 Pat., 696, referred to ...	385
Annada Mohan Roy v. Gour Mohan Malik, I. L. R., 48 Calc., 536, distinguished ...	641
Appu Rao v. Rama Krishna Chettiar, I. L. R., 24 Mad., 672, referred to ...	384
Arora v. Bur Singh, I. L. R., 5 Lah., 371, referred to ...	19
Ashutosh Dutt v. Durga Churn Chatterjee, I. L. R., 5 Calc., 438, distinguished ...	677
Asma Bibi v. Ahmad Husain, I. L. R., 30 All., 290, distinguished ...	225
Authikesavulu Chetty v. Ramanujam Chetty, I. L. R., 32 Mad., 512, referred to ...	129, 134
Aziz Bakhsh v. Kaniz Fatima Bibi, I. L. R., 34 All., 490, referred to ...	703

B

Baboo Lekhraj Roy v. Baboo Mahtab Chand, 14 Moo. I. A., 393, referred to ...	55
Badal Ram v. Taj Ali, 4 A. L. J., 717, distinguished ...	645
Badami Kuar v. Dinu Rai, I. L. R., 9 All., 11, referred to ...	170
Bajrangi Singh v. Manokarnika Bakhsh Singh, I. L. R., 30 All., 1, referred to ...	487
Bakreedan v. Ummatul Fatma, 3 C. L. J., 541, referred to ...	808
Baldeo Misir v. Ram Lagan Shukul, I. L. R., 45 All., 709, referred to ...	618
Baldeo Singh v. Udal Singh, I. L. R., 43 All., 1, referred to ...	216
Baljit v. Mahipat, I. L. R., 41 All., 203, referred to ...	779, 786
Balkishen Das v. Legge, I. L. R., 22 All., 149, referred to ...	793
Balla Mal v. Ahad Shah, 16 A. L. J., 905, referred to ...	669
Balram Das, Fakir Chand v. Great Indian Peninsula Railway Com- pany, I. L. R., 47 All., 724, referred to ...	771

	Page.
Bangali Mal v. Ganga Ram, Asharfi Lal, 71 Indian Cases, cited in argument	431, ... 310
Bansidhar v. Kharagjit, I. L. R., 37 All., 65, referred to	... 417
Barrow-in-Furness Investment Co. <i>In re</i> —, I. L. R., 14 Ch. D., referred to	400, ... 509
Basdeo Rai v. Jhagru Rai, I. L. R., 46 All., 33, referred to	... 14
Baser Sheikh v. Fazle Karim Biswas, 19 C. W. N., 290, referred to	255
Batul Begam v. Mansur Ali Khan, I. L. R., 20 All., 315, referred to	15
Bawan Das v. Chiene, I. L. R., 44 All., 316, followed	... 403
Bechu Sahu v. Nandram Das, 12 A. L. J., 902, referred to	... 784
Behari Lal v. Madho Lal Ahir Gayawal, I. L. R., 19 Calc., referred to	236, ... 487
Bengal and North-Western Railway Company v. Haji Mutsaddi, 7 A. L. J., 833, referred to	... 770
Bengal and North-Western Railway Company v. Manorath Bhagat, 22 A. L. J., 1035, referred to	... 771
Bhagwan Das v. Gurdayal, 19 A. L. J., 823, referred to	... 30
Bhagwan Sahai v. Bhagwan Din, I. L. R., 12 All., 387, referred to	795
Bhagwat Koer v. Dhanukdhari Prasad Singh, I. L. R., 47 Calc., referred to	466, ... 498
Bhartu v. Dalip, 3 A. L. J., 672, distinguished...	... 297
Bhaoni v. Maharaj Singh, I. L. R., 3 All., 738, referred to	... 133
Bhawani Kunwar v. Mathura Prasad Singh, I. L. R., 40 Calc., referred to	89, ... 192
Bhawani Prasad v. Damru, I. L. R., 5 All., 197, referred to	... 814
Bhikhi Mal v. Debi Sahai, I. L. R., 47 All., 923, followed	... 223
Bhup v. Ram Lal, I. L. R., 33 All., 795, referred to	... 778
Bhupal Singh v. Mohan Singh, I. L. R., 19 All., 324, referred to	... 814
Bhupal Singh v. Ujagar Singh, I. L. R., 43 All., 88, referred to	... 22
Bihari Lal v. Mohan Singh, I. L. R., 42 All., 268, referred to	... 617
Bisseswar Sonamut v. Jasoda Lal Chowdhry, I. L. R., 40 Calc., followed	704, ... 125
Brij Lal Singh v. Bhawani Singh, I. L. R., 32 All., 651, referred to	297, 293, ... 209
Brij Narain v. Mangal Prasad, I. L. R., 45 All., 95, distinguished	... 4
Brij Narain Rai v. Dhari Rai, 40 Indian Cases, 40, distinguished	... 491
Briji Kessoor Laul v. The Official Assignee of Madras, I. L. R., 43 Mad., 71, followed	... 274
Buddhu Lal v. Mewa Ram, I. L. R., 43 All., 564, distinguished	... 181
Buddhu Lal v. Mewa Ram, I. L. R., 43 All., 564, followed	... 494
Bukharam v. Ramji, 23 Indian Cases, 878, referred to	... 103
Byrne v. Boadle, 33 L. J., (Ex), 13, referred to	... 403

C

Cecil Gray v. The Cantonment Committee of Poona, I. L. R., 34 Bom., 583, referred to	... 826
Chabraj Singh v. Mahesh Narain Singh, I. L. R., 40 All., 572, dissented from	... 692
Chandan Singh v. Chandi Prasad, Weekly Notes, 1888, p. 227, referred to	... 15

TABLE OF CASES CITED.

iii

	Page.
Chandra Sen v. Ganga Ram, I. L. R., 2 All., 899, referred to ...	3
Chandu Mal v. Koka Mal, I. L. R., 43 All., 334, referred to ...	170
Chappan v. Moidin Kutti, I. L. R., 22 Mad., 68, referred to ...	227
Chaturi Singh v. Rania, I. L. R., 40 All., 525, distinguished ...	820
Chaudhri Gopal Das v. Tribhawan, I. L. R., 45 Bom., 365, followed ...	125
Chhajju Ram v. Neki, I. L. R., 49 I. A., 144; I. L. R., 3 Lah., 127, followed ...	162
Chhotey Lal v. Lakhmi Chand, Magan Lal, I. L. R., 38 All., 425, distinguished ...	820
Chintamony Dassi v. Raghoonath Sahu, I. L. R., 22 Calc., 981, referred to ...	180
Chunnu v. King-Emperor, 8 A. L. J., 656, referred to ...	369, 372
Chuttan Lal v. Kanhaya Lal, 10 A. L. J., 478, referred to ...	109
Crown v. Hamir Chand, 14 Punj. Rec., Cr. J., 39 referred to ...	166

D

Damber Singh v. Sri Kishan Dass, 6 A. L. J., 552, referred to ...	109, 110, 111, 114
Damodar Jagjiwan v. Govindji Jivabhai, 73 Indian Cases, 240, referred to ...	826
Damodar Das v. Lakhan Das, I. L. R., 37 Calc., 835, referred to ...	352
Damu valad Diga v. Vakrya valad Nath Kunbi, I. L. R., 44 Bom., 767, referred to ...	108
Danby v. Tafazzul Husain, 45 Indian Cases, 290, referred to ...	331
Daulat v. Sankatha, I. L. R., 47 All., 355, referred to ...	185
Davis v. Mayor of the Borough of Bromley [1908] 1 K. B., 170, referred to ...	566
Deendyal Lal v. Jugdeep Narain Singh, I. L. R., 3 Calc., 198, referred to ...	3
Dildar Husain v. Sheo Narain, I. L. R., 41 All., 157, distinguished ...	704
Doraisami v. Nondisami, I. L. R., 38 Mad., 118, disapproved ...	155
Dwarka Das v. Mohammad Ashfaq-ullah, I. L. R., 47 All., 96, referred to ...	206
Dyer and wife v. Munday, [1895] 1 Q.B., 742, referred to ...	567
Dwarka Ram v. Jhulai Pande, I. L. R., 45 All., 429, referred to ...	186

E

East Indian Railway Co. v. Kishan Lal, Tirkha Mal, I. L. R., 45 All., 530, referred to ...	585
East Indian Railway Company v. Nathmal Behari Lal, I. L. R., 39 All., 418, referred to ...	771
Emperor v. Ashootosh Chuckerbutty, I. L. R., 4 Calc., 483, followed ...	411
Emperor v. Bhawani Das, I. L. R., 38 All., 169, followed ...	63, 66
Emperor v. Bhagwati, I. L. R., 41 All., 60, referred to ...	375
Emperor v. Jawahir Thakur, I. L. R., 38 All., 430, distinguished ...	144
Emperor v. Kehri, I. L. R., 29 All., 434, not applied ...	411
Emperor v. Lala Khan Chand, 72 Indian Cases, 523, not applied ...	271
Emperor v. Lalta Prasad, I. L. R., 34 All., 654, referred to ...	62

	Page.
Emperor v. Sheo Saran Lal, I. L. R., 32 All., 219, referred to ...	233
Emperor v. Shuja-ud-din Ahmad, I. L. R., 44 All., 540, referred to ...	238
Endoori Venkataramaniah v. Venkatachainulu, I. L. R., 33 Mad., 80, referred to ...	439

F

Fateh Lal v. Sher Singh (Civil Revision No. 40 of 1924, decided July 30, 1924), referred to ...	95
Fateh Singh v. Gopal Narain Singh, I. L. R., 48 All., 88, referred to ...	784
Fateh Singh v. Thakur Rukmini Ramanji Maharaj, I. L. R., 45 All., 339, referred to ...	642
Fazal Ilahi v. Prag Narain, I. L. R., 44 All., 523, referred to ...	30
Forbes v. Ameeroonnissa Begam, 10 Moo. I. A., 340, referred to ...	646

G

Gabrielnathaswami v. Valliammai Anand, 53 Indian Cases, 423, referred to ...	129
Gaj Kumar Chander v. Salamat Ali, 17 A. L. J., 1057, referred to ...	106, 109, 112
Gajendra Singh v. Durga Kunwar, I. L. R., 47 All., 637, followed ...	480
Ganesh Lal v. Debi Das, I. L. R., 47 All., 140, referred to ...	170
Ganga Chamar v. Bindeshri Rai, I. L. R., 47 All., 904, referred to ...	93
Ganga Dayal v. Mani Ram, I. R., 31 All., 156, approved ...	154
Ganga Ram v. Mihin Lal, I. L. R., 28 All., 416, distinguished ...	662
Ganpat Rama Joshi v. The Secretary of State for India in Council, I. L. R., 45 Bom., 1106, followed ...	665
Gaura v. Nawab Muhammad Abdul Majid, 64 Indian Cases, 523, referred to ...	420
Gaya Din v. Jhuman Lal, I. L. R., 37 All., 400, discussed ...	463
Ghelabhai v. The East Indian Railway Co., I. L. R., 45 Bom., 1201, referred to ...	585
Ghuznavi v. The Allahabad Bank, Ltd., I. L. R., 44 Calc., 929, distinguished ...	182
Girdhari Das v. Jagannath, I. L. R., 3 All., 115, distinguished ...	333
Girwar Singh v. Thakur Narain Singh, I. L. R., 14 Calc., 730, referred to ...	308
Gokaran Singh v. Ganga Singh, I. L. R., 42 All., 91, referred to ...	21
Golam Hossein Cassim Ariff v. Fatima Begum, 16 C. W. N., 394, referred to ...	212
Gopal Prasad v. Kashi, I. L. R., 42 All., 39, referred to ...	704
Gopi Nath v. Jeot Ram, I. L. R., 45 All., 478, referred to ...	14
Gordon v. Jennings, L. R., 9 Q. B. D., 45, referred to ...	165
Gregory v. Molesworth, 3 Atk., 626, referred to ...	54
Grey v. Woogramohan Thakur, I. L. R., 28 Calc., 790, referred to ...	373
Gujrati v. Sital Misir, I. L. R., 44 All., 459, overruled ...	336
Gulab Kunwar v. Thakur Das, I. L. R., 42 All., 464, referred to ...	180
Gupteshwar Ram v. Rati Krishna Ram, I. L. R., 34 All., 542 ...	814
Gulzari Lal v. Latif Husain, I. L. R., 38 All., 181, followed ...	105

TABLE OF CASES CITED.

H

	Page.
Habibur Rahman Chaudhry v. Altaf Ali Choudhury, I. L. R., 48 Calc., 856, referred to ...	59
Hadu v. Lala, 41 Punj. Rec., referred to ...	87
Hamira Bibi v. Zubaida Bibi, I. L. R., 38 All., 182, referred to ...	807
Hanuman Prasad Narain Singh v. Harakh Narain, I. L. R., 42 All., 142, referred to ...	394
Harbans Lal v. Kundan Lal, I. L. R., 21 All., 140, distinguished ...	287
Harkeshi v. Mewa Ram, 72 Indian Cases, 247, dissented from ...	222
Har Prasad v. Ram Chandar, I. L. R., 44 All., 37, referred to ...	296, 298
Hari Ram v. Indraj, I. L. R., 44 All., 730, referred to ...	19
Harish Chandra Acharya v. Nawab of Moorsheedabad, 13 C. L. J., 688, referred to ...	227
Het Ram v. Ganga Sahai, I. L. R., 40 All., 615, referred to ...	167
Hevanchal Kunwar v. Kanhai Lal, 12 Oudh Cases, 405, referred to ...	177
Hinton v. Dibbin, 2 Q. B. R., 646, referred to ...	54
Hira v. Hansji Prema, I. L. R., 37 Bom., 295, referred to ...	133
Hoghton. <i>In re</i> —, L. R., 18 Eq., 573, referred to ...	53
Hunooman Persaud Pandey v. Babooee Munraj Koonwaree, 6 Moo. I. A., 398, referred to ...	597

I

Iftikhar Ali v. Thakur Singh, 15 Indian Cases, 347, referred to ...	621
Imam-ud-din v. Sadarath Rai, I. L. R., 32 All., 301, referred to ...	253
Indar Kuar v. Lalta Prasad, I. L. R., 4 All., 532, referred to ...	598
Ishar Das v. Asaf Ali Khan, I. L. R., 34 All., 186, overruled 190, 195, 198	
Ishar Das v. Keshab Deo, I. L. R., 32 All., 657, referred to ...	242
Ishwar Dat Upadhya v. Mahesh Dat Upadhya, I. L. R., 47 All., 910, followed ...	347

J

Jagadindra Nath Roy v. Hemanta Kumari, L. R., 31 I. A., 203, referred to ...	351
Jagan Nath v. Ajudhia Singh, I. L. R., 35 All., 14, referred to ...	778
Jagannath v. Dibbo, 6 A. L. J., 49, referred to ...	151
Jagannath Prasad Gupta v. Ranjit Singh, I. L. R., 25 Calc., 354, referred to ...	129
Jagar Nath v. Sheo Ghulam, I. L. R., 31 All., 45, referred to ...	432
Jagarnath Sahi v. Kamta Prasad Upadhya, I. L. R., 36 All., 77, referred to ...	200
Jagdip Narain Rai v. Ram Sarup Khan, 17 A. L. J., 691, distinguished	646
Jagdish Bahadur v. Sheo Partab Singh, I. L. R., 23 All., 369, referred to ...	651, 653
Jainnarain Pande v. Bhagwan Pande, I. L. R., 44 All., 683, referred to	186
Jamna Prasad v. Karan Singh, I. L. R., 41 All., 28, referred to	109, 111
Jhanda Singh v. Wahid-ud-din, I. L. R., 38 All., 570, referred to ...	795

	Page.
Josiem Tiruvengadachariar v. Sawmi Iyengar, I. L. R., 34, Mad., 76, referred to ...	635
Jotindra Mohan Tagore v. Mahomed Basir Chowdhry, I. L. R., 32 Calc., 332, referred to ...	365

K

Kaleshar Rai v. Nabiban Bibi, I. L. R., 28 All., 642; 4 A. L. J., 351, referred to ...	692
Kallan Khan v. Mardan Khan, I. L. R., 20 All., 155, referred to ...	173
Kalyan Singh v. Jagan Prasad, I. L. R., 37 All., 589, referred to ...	206, 207
Kanakammal v. Ananthamathi Ammal, I. L. R., 37 Mal., 293, followed ...	665
Kanhai Lal v. Brij Lal, I. L. R., 40 All., 487, referred to ...	641
Kanhaiya Lal v. Tirbeni Sahai, I. L. R., 36 All., 532, followed ...	615
Kanhya Lal v. Jagannath Prasad, Hanuman Prasad, 19 A. L. J., 33, referred to ...	241
Kannu Mal v. Indarpal Singh, I. L. R., 45 All., 273, followed ...	613
Karan Singh v. Bhup Singh, I. L. R., 27 All., 16, referred to ...	3
Kasturachand Lakhmaji v. Jakhia Padia Patil, I. L. R., 40 Bom., 74, referred to ...	795
Katwari v. Sita Ram Tewari, I. L. R., 43 All., 547, referred to ...	385
Kaunsilla v. Ishri Singh, I. L. R., 32 All., 499, referred to ...	124
Kearley v. Thomson, 24 Q. B. D., 742, referred to ...	758
Keet. <i>In re</i> —, (1905) 2 K. B., 666, followed ...	274
Kesar Kunwar v. Kashi Ram, I. L. R., 37 All., 634, distinguished... 297	297
Kesho Das v. Murat Pandey, 12 A. L. J., 367, referred to ...	106, 109
Khetpal v. Tikam Singh, I. L. R., 34 All., 396, referred to ...	126
Khiali Ram v. Nathu Lal, I. L. R., 15 All., 219, referred to ...	91
Khuda Bakhsh v. Mathra Das, 62 Punj. Rec., referred to ...	87
Khuman Singh v. Makhan Singh, 5 A. L. J., 550, referred to ...	431
King v. Editor of the <i>Daily Mail</i> , (1921) 2 K. B., 733, referred to ...	729
Kishore Chand Bhakat v. Gisborne and Co., I. L. R., 17 Calc., 341, referred to ...	439
Kochappa v. Sachi Devi, I. L. R., 26 Mad., 494, referred to ...	722
Krishna Bai v. The Secretary of State for India in Council, I. L. R., 42 All., 555, followed ...	499
Krishna Behari Sen v. The Corporation of Calcutta, I. L. R., 31 Calc., 993, not followed ...	634, 637
Kuber Upadhiya v. Ramakar Dat Upadhiya, I. L. R., 47 All., 357, referred to ...	832

L

Lachhman v. Tulsi Ram, 2 A. L. J., 199, referred to ...	491
Lachmi Narain v. Kunji Lal, I. L. R., 16 All., 449, referred to ...	3, 5
Lachmi Narain v. Muhammad Yusuf, I. L. R., 42 All., 540, approved ...	337
Lakshman Dada Naik v. Ram Chandra Dada Naik, I. L. R., 5 Bom., 54, followed ...	322
Lal Bahadur Lal v. Kamleshar Nath, I. L. R., 48 All., 183, referred to ...	603

TABLE OF CASES CITED.

vii

	Page.
Lalla Sheo Churn Lal v. Ramanandan Dobey, I. L. R., 22 Calc., 8, referred to	53
Lalla Prasad v. Kharga, 21 A. L. J., 189, referred to	106, 109
Lead Company's Workmen's Fund Society. <i>In re</i> —, (1904) 2 Ch. 196, referred to	740, 750, 752, 756
Legal Remembrancer v. Motilal Ghose, I. L. R., 41 Calc., 173, distinguished	718, 723, 724, 732
Liladhar v. Chatarbuj, I. L. R., 21 All., 277, referred to	431
Lutawan v. Lachya, I.L.R., 36 All., 69, referred to	229

M

Macdonald, Sons and Co., <i>In re</i> —, [1894] I Ch., 89, referred to	509
Machine Exchange Company. <i>In re</i> the—, I. L. R., 12 Bom., 311, referred to	583
Madhavrao Keshavrao v. Sahebrao Ganpatrao, I. L. R., 39 Bom., 119, referred to	795
Mahabir Prasad v. Basdeo Singh, I. L. R., 6 All., 234, referred to	11
Mahabir Prasad Misir v. Mahadeo Dat Misr, I. L. R., 13 All., 386, referred to	278, 279
Mahadeo Prasad Singh v. Mata Prasad, I. L. R., 44 All., 44, referred to	641
Mahadeo Sahai v. The Secretary of State for India in Council, I. L. R., 44 All., 248, followed	495
Mahaganam Venkatrayar v. Kodi Venkatrayar, I. L. R., 45 Mad., 29, referred to	167
Mahant Krishna Dayal v. Musammat Sakina Bibi, 1 Pat., L. J., 214, followed	125
Maina Bibi v. Wasi Ahmad, I. L. R., 38 All., 581, and I. L. R., 47 All., 250, followed	806
Mannilal Motilal v. Gokaldas Rawji, I. L. R., 45 Bom., 245, followed	430
Manohar Lal v. Jadunath Singh, I. L. R., 28 All., 585, referred to	365
Mangul Pershad Dichit v. Grija Kant Lahiri, I. L. R., 8 Calc., 51, referred to	205
Marris v. Thompson, (1894) 1 Q. B., 548, referred to	744, 751, 756
Marwadi Moti Ram v. Samnaji, 31 M. L. J., 772, referred to	632
Mathura Kuar v. Durga Kuar, 2 A. L. J., 747, distinguished	66
Maula Bakhsh v. Tajammul Husain, Weekly Notes, 1892, p. 51, followed	647
Maung Kyin v. Ma Shwe La, I. L. R., 45 Calc., 320, referred to	794
Midnapur Zemindary Co., Ltd. v. Uma Charan Mandal, 21 A. L. R., 723, followed	591
Mohammad Ehtisham Ali v. Lalji Singh, 17 A. L. J., 123, referred to	106, 109, 112, 113
Mohandas Karamchand Gandhi. <i>In re</i> —, 22 Bom. L. R., 378, followed	718, 724
Mohindra Man Singh v. Maharaj Singh, I. L. R., 45 All., 72, referred to	795
Moosa Haji Joonas v. Haji Abdul Rahim, I. L. R., 30 Bom., 197, referred to	133

	Page
Morgan v. London General Omnibus Co., L. R., 12 Q. B. D., 201, referred to	165
Motilal v. Harnarayan, I. L. R., 47 Bom., 716, referred to ...	682
Moti Ram v. Muhammad Abdul Jalil, I. L. R., 46 All., 409, followed	396
Mubarak Husain v. Ahmad, I. L. R., 46 All., 489, followed ...	387
Muhammad Allahdad Khan v. Muhammad Ismail Khan, I. L. R., 19 All., 289, referred to	59
Muhammad Allahdad Khan v. Muhammad Ismail Khan, I. L. R., 10 All., 289, referred to	627
Muhammad Hamid-ud-din v. Fakir Chand, I. L. R., 42 All., 437, referred to	794
Muhammad Jan v. Fazal-ud-din, I. L. R., 46 All., 514, referred to ...	14
Muhammad Sadiq v. Laute Ram, I. L. R., 23 All., 291, referred to ...	22
Muhammad Suleman Khan v. Muhammad Yar Khan, I. L. R., 17 All., 39, referred to	285
Mukh Ram v. Chajju, 17 A. L. J., 646, referred to	779
Mullo v. Ram Lal, I. L. R., 43 All., 191, referred to	93
Municipal Board of Mussoorie v. Goodall, I. L. R., 26 All., 482, referred to	563
Munna Lal v. Radha Kishan, I. L. R., 37 All., 591, referred to ...	343
Munshi v. Daulat, I. L. R., 29 All., 262, referred to	173
Murari Lal v. E. V. David, I. L. R., 47 All., 291, referred to ...	827
Murlidhar v. Diwan Chand, I. L. R., 38 All., 214, referred to ...	581
Murugappa Chettiar v. Ponnusami Pillai, I. L. R., 44 Mad., 828, referred to	632
Musammatt Dhanwanti Kuar v. Sheo Shankar, 4 P. L. J., 340, referred to	190, 195, 196
Muthuvelu Mudaliar v. Vythilinga Mudaliar, I. L. R., 42 Mad., 407, referred to	795

N

Nadir Husain v. Sadiq Husain, I. L. R., 47 All., 324, distinguished	692
Najib-ullah v. Gulsher Khan, I. L. R., 31 All., 343, referred to ...	778
Nand Lal v. Kishori, 12 A. L. J., 1270, referred to	200
Nand Ram v. Bhopal Singh, I. L. R., 34 All., 592, referred to ...	180
Narasingerji Gyanagerji v. Panuganti Parthasaradhi, I. L. R., 51 I. A., 305, referred to	795
Nazir Ahmad v. Muhammad Sharif, I. L. R., 46 All., 453, referred to	21
Neelamani Patnaik Mussadi v. Sukaduvu Beharu, I. L. R., 43 Mad., 803, distinguished	707
Neelavani v. Narayana Reddi, I. L. R., 43 Mad., 94, referred to ...	182
Niddha Lal v. The Collector of Bulandshahr, 14 A.L.J., 610, referred to	11
Nizam-ud-din v. Abdul Aziz, I. L. R., 31 All., 521, referred to ...	553
Noor Mahomad Cassum v. Kaikhosru Maneckjee, 4 Bom., L. R., 268, referred to	63

O

Official Assignee of Madras v. Ram Chandra Ayyar, I. L. R., 46 Mad., 54 followed	401, 403
--------------------------------------------------------------------------------------------	----------

TABLE OF CASES CITED.

ix

	Page.
One and All Sickness and Accident Assurance Association, <i>In re</i> —,	
24 T. L. R., 674, referred to	744, 756

P

Padam Kumari v. Suraj Kumari, I. L. R., 28 All., 458, followed ...	671
Padstow Total Loss and Collision Assurance Association. <i>In re</i> —,	
20 Ch. D., 137, referred to	739, 749, 756
Palaniappa Chetty v. Sreemath Devasikamony Pandara Samadhi,	
I. L. R., 40 Mad., 709, referred to	597
Pandiri Bangaram v. Karumoory Subbaraju, I. L. R., 34 Mad., 159,	
referred to	151
Pandurang Luxman Dada v. Govind, I. L. R., 40 Bom., 557,	
referred to	19C, 194, 196, 198
Parbhu Narain Singh, Kashi Naresb v. Harbans Lal, 14 A. L. J., 281,	
referred to	106, 109, 110, 118
Parmeswari Pershad v. Sheo Dutt Rai, 6 C. L. J., 448, referred to ...	56
Parsotam Rao v. Janki Bai, I. L. R., 28 All., 109, referred to ...	428
Parsotam Rao v. Janki Bai, I. L. R., 28 All., 109, referred to ...	484
Partab Singh v. Bhabuti Singh, I. L. R., 35 All., 487, referred to ...	365
Parvathammal v. Chokkalinga Chetty, I. L. R., 41 Mad., 241,	
referred to	212
Pasupathy Ayyar v. Kothanda Rama Ayyar, I. L. R., 28 Mad., 64,	
referred to	365
Piari Lal v. Makhan, I. L. R., 34 All., 528, dissented from ...	707
Prem Chand Dey v. Mokhoda Debi, I. L. R., 17 Calc., 699, referred to	572
Prosunno Kumar Sanyal v. Kali Das Sanyal, I. L. R., 19 Calc., 683,	
referred to	95
Punjab Singh v. Ramautar Singh, 4 Patna L. J., 676, referred	
to	683, 684
Puran Mal v. Krant Singh, I. L. R., 20 All., 8, referred to ...	553

Q

Queen-Empress v. Kirpal Singh, I. L. R., 9 All., 523, followed ...	689
Queen v. Tankard, 86 L. T. R., 759, referred to	744, 757

R

Radha Kishen v. Khurshed Hossein, I. L. R., 47 Calc., 662, followed ...	559
Ragho Prasad v. Mewa Lal, I. L. R., 34 All., 223, referred to ...	572
Raghunath Prasad v. Sarju Prasad, I. L. R., 3 Pat., 279; L. R., 51	
I. A., 101, referred to	668
Rahima v. Abdul Razzaq, 21 A. L. J., 184, referred to ...	814
Raja of Ramnad v. Velusami Tevar, L. R., 48 I. A., 45, referred to	205
Rajmal Manikchand Marwadi v. Hanmant Anyaba, I. L. R., 20	
Bom., 697, referred to	826
Ralli Brothers v. Ambika Prasad, I. L. R., 35 All., 182, referred to ...	32
Ram Anugra Narain Singh v. Chowdhry Hanuman Sahai, I. L. R.,	
30 Calc., 303; L. R., 30 I. A., 41, followed	765
Ram Baran Rai v. Har Sewak Dube, I. L. R., 40 All., 387, distin-	
guished	645

	Page
Ram Barechha Ram v. Tarak Tiwari, 14 A. L. J., 589, referred to ...	832, 834
Ram Jas v. Chani, 55 Indian Cases, 587, not followed ...	301
Ram Kirpal v. Rup Kuari, I. L. R., 6 All., 269, referred to ...	205
Ram Kumar v. Nem Chand, 19 A. L. J., 886, referred to ...	742
Ram Sarup Lal v. Shah Latafat Hossein, I. L. R., 29 Calc., 735, referred to ...	54
Ram Singh v. Girraj Singh, I. L. R., 37 All., 41, referred to ...	784
Ram Subhag Singh v. Dip Narain Singh, I. L. R., 44 All., 74, referred to ...	21
Ramaswami Ayyar v. The King-Emperor, I. L. R., 41 Mad., 589 distinguished ...	144
Rangasami Gounden v. Nachiappa Gounden, I. L. R., 42 Mad., 523, referred to ...	487
Ranjit Singh v. Ramdhan Singh, I. L. R., 31 All., 482, referred to ...	298, 299
Rao Bahadur Man Singh v. Maharani Nawlakhbati, 24 A. L. J., 250, referred to ...	188
Raoji Bhikaji v. Anant Laxman, I. L. R., 42 Bom., 535, referred to ...	424
Raoji Bhikaji v. Anant Laxman, I. L. R., 42 Bom., 535, referred to ...	484
Rashid-un-nissa v. Muhammad Ismail Khan, I. L. R., 31 All., 572, referred to ...	365
Ratanchand Dharamchand v. The Secretary of State for India in Council, 18 C. W. N., 1340, referred to ...	826
R. v. Clarke, 103, L. J., 636, referred to ...	728, 729
R. v. Davies, (1905) 1 K. B., 32, referred to ...	722
R. v. Gray, (1900) 2 Q. B., 36, referred to ...	721
R. v. Parke, (1903) 2 K. B., 432, referred to ...	728
Rivers Steam Navigation Co. v. Choutmull Doogar, I. L. R., 26 Calc., 398, referred to ...	408
Rughoonath Doss v. Mr. T. Halle, 16 W. R., C. R., 60, referred to ...	32
Ruhul Amin v. Shankar Lal, I. L. R., 45 All., 701, distinguished ...	662
Rustomji Dorabji v. Nurse, I. L. R., 44 Mad., 357, referred to ...	632

S

Sadabart Prasad Sahu v. Foolbash Koer, 3 B. L. R., 31, approved and applied ...	323
Sabhadhi Lal v. Govind Singh, I. L. R., 46 All., 617, referred to ...	11
Sadhu Saran Prasad v. Brahmdeo Prasad, 61 Indian Cases, 20, referred to ...	600
Sajjad Ali Khan v. Ishaq Khan, I. L. R., 42 All., 174, referred to ...	331
Sanmukh Pande v. Jagarnath Pande, I. L. R., 46 All., 531 ...	186
Sarat Kamini Das v. Chaitanya Chandra Bohoraj, 67 Indian Cases, 290, referred to ...	86
Sardari Lal v. Ram Lal, I. L. R., 1 Lah., 225, referred to ...	255
Sarju Prasad v. Mahadeo Pande, I. L. R., 37 All., 450, followed ...	821
Sashi Bhushan Sarbadhikary. In the matter of—, I. L. R., 29 All., 95, referred to ...	716, 721, 732
Sat Narain v. Behari Lal, I. L. R., 6 Lah., 1, followed ...	344
Sat Narain v. Behari Lal, I. L. R., 6 Lah., 1, distinguished ...	403

TABLE OF CASES CITED.

xi

	Page.
Satrohan Lal v. Nageshwar Prasad, 19 Oudh Cases, 75, referred to ...	216
Scott v. London Dock Co., 34 L. J., (Ex), 220, referred to ...	408
Secretary of State for India in Council v. Jawahir Lal, I. L. R., 36 All., 255, referred to ...	338
Sesupuri v. Dwarka Prasad, 10 A. L. J., 181, followed ...	671
Sewak Jeranchod Bhogilal v. The Dakore Temple Committee, 23 A. L. J., 555, distinguished ...	685
Shaikh Kamar-ud-din Ahmad v. Jawahir Lal, L. R., 32 I. A., 102, referred to ...	703
Sham Behari Lal v. Ram Kali, I. L. R., 45 All., 715, referred to ...	657
Shankar Bharati v. Narsingha Bharati, I. L. R., 47 Bom., 106, referred to ...	380
Shankerbhai Manoharbhay Patel v. Motilal Ramdas Shah, I. L. R., 49 Bom., 118, referred to ...	256
Sheikh Abdul Kadir Saheb, <i>In re</i> —, 33 Indian Cases, 648, disapproved ...	271
Sheikh Dendoo v. Sheikh Sachoo, 72 Indian Cases, 2, referred to ...	87
Sheikh Kallu v. Nadir Bakhsh, 19 A. L. J., 907, referred to ...	181, 182
Sheo Mangal v. Musammam Hulsa, I. L. R., 44 All., 159, referred to ...	206, 207
Sheo Partab Bahadur Singh v. The Allahabad Bank, I. L. R., 25 All., 476, referred to ...	650, 651
Sheorania v. Bharat Singh, I. L. R., 20 All., 90, distinguished ...	662
Sheo Shankar Lal v. Debi Sahai, I. L. R., 25 All., 468, referred to ...	650, 652, 654, 656, 659
Shiam Saran v. Banarsi Das, 20 A. L. J., 258, not approved ...	173
Shib Dayal v. Mehrban, I. L. R., 45 All., 27, referred to ...	307
Shib Dayal v. Meharban, I. L. R., 45 All., 27, discussed ...	464
Shikri Prasad v. Aziz Ali, I. L. R., 44 All., 71, referred to ...	416
Sonatun Bysack v. Sreemutty Juggutsoondree Dossee, 8 Moo. I. A., 66, distinguished ...	676
Soni Ram v. Kanhaiya Lal, I. L. R., 35 All., 227, followed ...	125
South Wales Atlantic Steamship Company. <i>In re</i> —, L. R., 2 Ch. D., 763, referred to ...	739, 744
Sri Gopal v. Pirthi Singh, I. L. R., 24 All., 429, distinguished ...	556
Sri Narain v. Jagannath, 15 A. L. J., 653, cited in argument ...	310
Sri Thakur Radhika Raman Bihariji Maharaj v. Bohra Shiam Sundar Lal, I. L. R., 45 All., 561, followed ...	693
Sub-Collector of Godavari v. Seragam Subbaroyadu, I. L. R., 30 Mad., 151, followed ...	499
Subrati Jan Mahomed. <i>In re</i> —, I. L. R., 38 Bom., 200, followed ...	274
Subramanian Chetti, v. Arunachelam Chetti, I. L. R., 28 Mad., 1, referred to ...	653
Subramaya Chettiar v. Alagappa Chettiar, I. L. R., 30 Mad., 268, dissented from ...	382
Sukha v. Raghunath Das, I. L. R., 39 All., 214, distinguished ...	820
Sundar Das v. Dhanpat Rai, (1907) P. R., 16, referred to ...	621
Sundaram v. Mausā Mavuthar, I. L. R., 44 Mad., 554, referred to ...	190
	195, 196

	Page
Sundar Singh v. Daru Shankar, I. L. R., 20 All., 78, referred to	126
Suraj Bunsu Koer v. Sheo Prasad Singh, I. L. R., 5 Calc., 148, referred to	3, 5
Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court at Fort William in Bengal, I. L. R., 10 Calc., 109, referred to	720, 724
Surja Kunwari v. Har Narain Rai, I. L. R., 39 All., 311, distinguished	677

T

Tasadduq Husain v. Hayat-un-nissa, I. L. R., 25 All., 280, referred to	180
Tej Narain Sahu v. Dal Ram Sahu, I. L. R., 1 Pat., 699, referred to	254
Teni Shah v. Bolahi Shah, 5 Indian Cases, 879, referred to	63
Thoyi Ammal v. Subbraoya Mudali, I. L. R., 22 Mad., 284, referred to	278, 279
Thumbhuswamy Moodelly v. Hossain Rowthen, I. L. R., 1 Mad., 1, referred to	793
Tula Ram v. Tulshi Ram, I. L. R., 42 All., 559, referred to	600
Tursi v. Mohan, 35 Indian Cases, 302, referred to	773

U

Umed Singh v. Seth Sobhag Mal Dhadha, I. L. R., 43 Calc., 290, referred to	242
Union Bank, Allahabad, Ltd In re the—, I. L. R., 47 All., 669, referred to	583

V

Vaddadi Sannamma v. Koduganti Radhabhayi, I. L. R., 41 Mad., 418, referred to	578
Vasudeva Mudaliar v. Srinivasa Pillai, I. L. R., 30 Mad., 426, referred to	304, 303
Venkata Rao. In the matter of—, 21 M. L. J., 832, followed	718, 724
Vigneswara v. Bapayya, I. L. R., 16 Mad., 436, disapproved	155

W

Wajid Ali Khan v. Puran Singh, I. L. R., 47 All., 100, referred to	87
Wajid Ali Khan v. Puran Singh, I. L. R., 47 All., 100, referred to	253, 256, 257
Ward v. General Omnibus Company, 42 L. J., C. P., 265, referred to	567
Willmott v. Barber, L. R., 15 Ch. D., 96, followed	355
Wilson v. Brett, II M and W., 113, referred to	54

Y

Yad Ram v. Sundar Singh, I. L. R., 45 All., 425, referred to	190
Yad Ram v. Sundar Singh, I. L. R., 45 All., 425, distinguished	287
Yad Ram v. Sundar Singh, I. L. R., 45 All., 425, followed	430

Z

	Page.
<i>Zafar Husain v. Ummat-ur-Rahman</i> , I. L. R., 41 All., 278, referred to ...	838, 841
<i>Zaib-un-nissa v. Maharaja Parbhu Narayan Singh</i> , 15 A. L. R., 625, referred to ...	173
<i>Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan</i> , I. L. R., 10 All., 166, referred to ...	96
<i>Zohra v. Mangu Lal</i> , I. L. R., 28 All., 753, followed ...	105

THE
INDIAN LAW REPORTS,
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APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

SHIVA NATH PRASAD (APPLICANT) v. TULSHI RAM
(OPPOSITE PARTY).*

1925
May, 20.

Hindu law—Joint ancestral estate—Mortgage-deed executed by father—Debt tainted with immorality—Money decree against father personally—Father's interest not exempt from attachment and sale.

THE fact that a debt incurred by the father of a Hindu joint family is tainted with immorality may be a reason for invalidating a mortgage of joint family property, but it is not a reason for exonerating from liability the father's interest in such property, which is liable to be sold in execution of a simple money decree against him. *Deendyal Lal v. Jugdeep Narain Singh* (1), *Suraj Bunsu Koer v. Sheo Prasad Singh* (2), *Lachmi Narain v. Kunji Lal* (3), *Chandra Sen v. Ganga Ram* (4), *Karan Singh v. Bhup Singh* (5) and *Abdul Karim v. Ram Kishore* (6), referred to and followed. *Brij Narain v. Mangal Prasad* (7), not applied.

Mr. B. Mallick and Munshi Gulzari Lal, for the appellant.

Babu Piari Lal Banerji, for the respondent.

SULAIMAN and DANIELS, JJ. :—This is an appeal by a Hindu son from a decree passed in execution

* First Appeal No. 500 of 1924, from a decree of Syed Iftikhar Husain, Additional Subordinate Judge of Ghazipur at Ballia, dated the 5th of August, 1924.

(1) (1877) I.L.R., 3 Calc., 198.

(2) (1878) I.L.R., 5 Calc., 148.

(3) (1894) I.L.R., 16 All., 449.

(4) (1880) I.L.R., 2 All., 899.

(5) (1904) I.L.R., 27 All., 16.

(6) (1925) I.L.R., 47 All., 421.

(7) (1923) I.L.R., 46 All., 95.

1925
SHIVA NATH
PRASAD
v.
TULSHI RAM.

against him. His father had made a mortgage in favour of the plaintiff decree-holder and a suit was instituted against him impleading his minor son. On behalf of the son it was pleaded that the debt was tainted with immorality and, therefore, the mortgage was bad and the son was not liable to pay the debt. The court found that the debt was proved to have been tainted with immorality and declined to pass a decree for sale on the basis of the mortgage-deed, but simply passed a money decree against the father personally. The decree-holder put the decree for money against the father in execution and attached the whole of the ancestral property, including that which had been mortgaged. The court below has allowed the objection of the son so far as the attachment of his interest in the property is concerned but has ordered execution against the interest of the father in the joint property. The son appeals to this Court and on his behalf it is contended, in the first place, that the effect of the previous decision was to make the entire family property free from all liability; and in the next place it is contended that in the face of the finding that the debt was tainted with immorality, it is not open to the decree-holder to attach any portion of the joint ancestral property. We think that there is absolutely no substance in the first contention. All that the court held was that in view of the finding on the question of immorality the mortgage was bad and therefore there had been no transfer of the property and no charge created. It passed a simple money decree against the father, but it did not in any other way hold that any ancestral property would never be liable to be sold in execution of the decree against the father.

The next contention also has no force. It was held by their Lordships of the Privy Council in the

case of *Deendyal Lal v. Jugdeep Narain Singh* (1) that the right title and interest of one co-sharer in a joint ancestral estate might be attached and sold in execution to satisfy a decree against him personally under the law of Mitakshara. This principle was re-affirmed by their Lordships in the case of *Suraj Bansi Koer v. Sheo Prasad Singh* (2) where at page 174 their Lordships observed that the previous decision had recognized the seizable character of an undivided share in a joint property. This case has been followed by this Court in the case of *Lachmi Narain v. Kunji Lal* (3) and in the case of *Chandra Sen v. Ganga Ram* (4). It seems to us that if the interest of the father alone can be seized in execution of a decree against him, the question of the immorality of the debt does not arise. The son is not called upon to pay this debt nor is his property said to be attached and sold. He is entitled to get his interest in the joint property exempted. But it does not follow that he is also entitled to prevent the attachment and sale of the interest of his father against whom a decree is in force. In the Full Bench case of *Karan Singh v. Bhup Singh* (5) reference was made to an earlier Privy Council case and it was pointed out that if the son sought to escape from having *his interest* affected by the sale, he had to establish that the debt he desired to be exempted from paying was of such a character that he as a Hindu son could not be under the pious obligation to discharge it. In the recent case of *Abdul Karim v. Ram Kishore* (6) the above mentioned Full Bench case was followed.

1925

SHIVA NATH
PRASAD
v.
TULSHI RAM.

It is lastly contended that the observations of their Lordships of the Privy Council in the case of

(1) (1877) I.L.R., 3 Cal., 198.

(2) (1878) I.L.R., 5 Cal., 148.

(3) (1894) I.L.R., 16 All., 449 (455-6).

(4) (1880) I.L.R., 2 All., 899.

(5) (1904) I.L.R., 27 All., 16.

(6) (1925) I.L.R., 47 All., 421.

1925
SHIVA NATH
PRASAD
v.
TULSHI RAM.

Brij Narain v. Mangal Prasad (1) conclude this point and make the entire estate free from liability in case the debt is contracted for immorality. We think that the propositions laid down by their Lordships do not cover the point now before us. The question whether the interest of one coparcener can be attached and sold in execution of a decree against him was not a matter before their Lordships. The previous cases referred to above therefore still hold good. We are of opinion that this appeal has no force. It is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

1925
May, 21.

FAQIR CHAND AND ANOTHER (JUDGMENT-DEBTORS) v. SANT LAL (DECREE-HOLDER).*

Hindu law—Joint family property—Attachment of undivided share—Death of judgment-debtor—Attachment not thereby raised.

The attachment of the undivided interest of a co-parcener creates a charge on his interest which is not extinguished by the death of that co-parcener. *Suraj Bunsu Koer v. Sheo Prasad Singh* (2) and *Lachmi Narain v. Kunji Lal* (3), followed.

THE facts of this case so far as they are necessary for the purpose of this report, sufficiently appear from the judgment of the Court.

Dr. Kailas Nath Katju, for the appellants.

Babu Piari Lal Banerji, for the respondent.

SULAIMAN and DANIELS, JJ. :—This is an appeal by the judgment-debtors from an order passed in execution. Faqir Chand is the father and Musammatt

* First Appeal No. 449 of 1924, from a decree of Abdul Hasan, Subordinate Judge of Dehra Dun, dated the 5th of August, 1924.

(1) (1923) I.L.R., 46 All., 95.

(2) (1879) I.L.R., 5 Calc., 148.

(3) (1894) I.L.R., 16 All., 449.

Srimati the widow of one Amir Chand, against whom the respondent had obtained a money decree in execution of which he attached his undivided share in the family house to the extent of a half. After the attachment but before the sale Amir Chand died and the decree-holder wanted to proceed with the execution against the attached property in the hands of the father and the widow. Objections were raised on behalf of the father which have been disallowed, hence this appeal.

1925
FAQIR
CHAND
v.
SANT LAL.

Two points have been urged before us. The first is that the effect of the attachment ceased as soon as Amir Chand died inasmuch as the property was undivided joint family property which has survived to the father. The second point is that the father is in no case the legal representative of the deceased Amir Chand.

The first contention is contrary to what was laid down by their Lordships of the Privy Council in the case of *Suraj Bansi Koer v. Sheo Persad Singh* (1) where it was clearly held that the attachment of an undivided interest of a co-parcener created a charge on his interest which was not extinguished by the death of that co-parcener. That case has been followed by this Court in the case of *Lachmi Narain v. Kunji Lal* (2).

As to the second point we think that too has no force. If by attachment the decree-holder had created a charge on the interest of the deceased Amir Chand, the equity of redemption must vest in the father who is a surviving member. If for any reason the attachment were to cease, the property would vest in the father. Under these circumstances Faqir Chand, the father, was the legal representative against whom execution ought to proceed. By way of precaution the learned Subordinate Judge has also impleaded

(1) (1879) I.L.R., 5 Cal., 148.

(2) (1894) I.L.R., 16 All., 449.

1925

FAQIR
CHAND
v.
SANT LAL.

Musammat Srimati, the widow, in case she wanted to file objections. This she did not do. Under these circumstances the order passed cannot be said to be in any way wrong. The appeal is dismissed with costs.

Appeal dismissed.

1925

May, 22.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

KASHI PRASAD AND ANOTHER (JUDGMENT-DEBTORS) v.
MATHURA PRASAD AND OTHERS (DECREE-HOLDERS).*

Partition—Appeal against final decree—Execution—Application for execution by parties who did not themselves dispute the decree—Limitation.

A decree in a suit for partition must be treated as a single decree and not as a series of decrees in favour of or against various parties to the case. Where, therefore, there has been an appeal and parties to the suit and the appeal are seeking to recover in execution sums of money awarded to them by the decree, limitation will run from the date of the appellate decree and not from the date of the final decree of the original court. Nor is the situation affected by the fact that the parties seeking execution did not, in the appellate court, take any exception to the decree. *Mashiat-un-nissa v. Rani* (1), distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Sankar Saran* and *Munshi Janki Prasad*, for the appellants.

Munshi Gulzari Lal, for the respondents.

LINDSAY and KANHAIYA LAL, JJ.:—This is an appeal in the execution department. It appears that on the 19th of March, 1923, B. Mathura Prasad and Harbans Prasad made an application for execution against the appellants here, namely, Kashi Prasad and Madan Mohan Prasad to recover a sum of Rs. 3,152.

* First Appeal No. 316 of 1924, from a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 12th of March, 1924.
(1) (1889) I.L.R., 13 All., 1.

The appellants here challenged the application alleging that it had been made beyond time and was not maintainable. The court below has held that the application is within limitation and now we have this appeal in which we are asked to find that the order of the court below is wrong.

The application now under consideration was based upon an order contained in a decree which was passed on the 29th of January, 1917. That was a final decree in a partition suit. In that suit the present appellants were arrayed as the third set of defendants and Mathura Prasad and Harbans Prasad who have made this application for execution were arrayed as the first and fourth sets of defendants.

Under the terms of the final decree passed by the court below on the 29th of January, 1917, the third set of defendants were directed to pay to Mathura Prasad, the first set of defendants and Harbans Prasad, the fourth set of defendants, Rs. 2,335-8-3.

If limitation for the application which we are now considering is to be deemed to run from the date of this final decree, there might be some force in the objection which was made by the present appellants. It appears, however, that on the 20th of November, 1917, the plaintiffs in that suit, Nandan Prasad and others filed an appeal against the final decree in the High Court. That appeal was finally disposed of by this Court on the 9th of February, 1922. This Court dismissed both the appeals and the cross-objections. It is stated that neither Mathura Prasad the first set, nor Harbans the fourth set, nor the present appellants Kashi Prasad and Madan Mohan the third set, raised any objections to the final decree in the course of this appeal by way of cross-objection or otherwise. On the other hand, it is admitted that these persons were all parties to the appeal in this Court.

1925

KASHI
PRASAD
v.
MATHURA
PRASAD.

1925

KASHI
PRASAD
v.
MATHURA
PRASAD.

We are of opinion that the Subordinate Judge was right in holding that limitation for the execution of this decree which we are now dealing with began to run from the date of the High Court's decree, that is to say, the 9th of February, 1922. We do not think it can be maintained that because the present appellants here or the present respondents did not challenge the final decree in the proceedings by way of appeal which were taken in this Court that therefore their relations are governed entirely by the final decree of the 29th of January, 1917, as passed by the trial court.

It is clear to us that when the appeal against the final decree was filed by the plaintiffs in the partition suit, the entire partition was under review, and if it had so happened that any relief had been given to the plaintiffs appellants in that appeal, the necessary consequence would have been that the whole partition decree would have had to be altered. In our opinion the decree must be treated as a single decree and not as a series of decrees in favour of or against various parties to the case. We are referred by the appellant's learned counsel to the Full Bench ruling of this Court reported in *Mashiat-un-nissa v. Rani* (1). That case is clearly distinguishable from the case which we are now dealing with. We hold that the court below was right in the view it took of this question of limitation and we dismiss the appeal accordingly with costs.

Appeal dismissed.

(1) (1889) I.L.R., 13 All., 1.

Before Mr. Justice Boys and Mr. Justice Banerji.

1925
May, 23.

JAGANNATH PRASAD AND ANOTHER (DECREE-HOLDERS) v.
JUGAL KISHORE AND OTHERS (JUDGMENT-DEBTORS).*

Hindu law—Liability of sons for debt of father—Immorality of debt pleaded—Test of immorality—Debt founded on an embezzlement committed by the father.

In order to ascertain what constitutes "immorality" of a debt so as to enable the sons to escape liability therefor, the test to be applied in cases where the father's liability arose out of an alleged act of misappropriation by him, is whether or not the action of the father which resulted in the debt was infected with an element of criminality. Whether such an element is established or not and the degree of infection which will support a plea of "immorality" must be a question for determination on the facts of each case; and though a conviction for misappropriation or other cognate offence may be good proof of such element, proof of a conviction is certainly not essential. *Mahabir Prasad v. Basdeo Singh* (1), *Nidha Lal v. The Collector of Bulandshahr* (2), and *Sabhaddi Lal v. Govind Singh* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Sankar Saran*, and *Munshi Baleshwari Prasad*, for the appellants.

Mr. *S. A. Haidar*, for the respondents.

BOYS and BANERJI, JJ.:—This appeal has been described to us at the opening of the arguments as a decree-holder's appeal, but, as a matter of fact, it is hardly in his capacity as a decree-holder that the appellant initiated these proceedings at all. The case has occupied a very long time in argument as certain facts were not brought to our attention until the extreme end of the hearing. It may really be decided briefly.

* Second Appeal No. 1428 of 1924, from a decree of E. T. Thurston, District Judge of Budaun, dated the 16th of August, 1924, confirming a decree of Rup Kishen Agha, Subordinate Judge of Budaun, dated the 29th of September, 1923.

(1) (1884) I.L.R., 6 All., 234.

(2) (1916) 14 A.L.J., 610.

(3) (1924) I.L.R., 46 All., 617.

1925

JAGANNATH
PRASAD
v.
JUGAL
KISHORE.

The appellant before us appeals from an order of the lower appellate court upholding an order of the first court dismissing his application under order XL, rule 4, of the Code of Civil Procedure. The appellant had been a party to some criminal and civil litigation in the course of which certain movable property which was in dispute had been entrusted, apparently in a more or less irregular manner, to one Shib Charan Lal, whom we may, for the purposes of this case only, describe as a receiver. He had apparently occupied some such position in the criminal litigation under Chapter XII of the Code of Criminal Procedure and irregularly succeeded to some sort of similar position in the civil litigation. The civil litigation was a suit for partition, and at the end of it the present appellant believed that the receiver had misappropriated some of his property and he was unable to extract it. For our present purposes his earlier efforts need not be mentioned; but on the 27th of August, 1923, he applied for attachment and sale of the property of the sons of Shib Charan Lal. The defences, as is generally the case in such proceedings, were various, but one of the defences was that the property in the hands of the sons was not liable for the debt of the father, that debt having its origin in "embezzlement". Both courts have dismissed his application, finding that there had been "misappropriation" on the part of the father. We have been referred to many cases as to what constitutes "immorality" of a debt so as to enable the sons to escape liability therefor. We think that the test to be applied in a case of the kind now before us is whether or not the action of the father which resulted in the debt was infected with an element of criminality. Whether such an element is established or not and the degree of infection which will support a plea of "immorality".

1925

JAGANNATH
PRASAD
v.
JUGAL
KISHORE.

must be a question for determination on the facts of each case; and though a conviction for misappropriation or other cognate offence may be good proof of such element, proof of a previous conviction is certainly not essential. The criminality and its degree may be inferred from a consideration of the whole facts. If there was such an element, it has been regarded, at any rate, by this Court as an immoral debt; otherwise, if there was no such criminal element. For the former proposition we may refer to the case of *Mahabir Prasad v. Basdeo Singh* (1), and for the latter to the decisions reported in *Niddha Lal v. The Collector of Bulandshahr* (2) and *Sabhaddi Lal v. Govind Singh* (3). Of the many cases we have considered of other courts, none appears to be in conflict, at any rate, with this principle.

In the present case both the lower courts have found that the father "misappropriated" and we were for some time in doubt, in view of the language used in some cases, as to whether we should regard this as a finding of criminal misappropriation or as one which possibly indicated no more than civil liability. Any doubt that we might have had, has, however, effectively been removed by our being referred to paragraph 9 of the application of the present appellant which initiated the present stage of these proceedings on the 24th of January, 1922. That was his application under order XL, rule 4, of the Code of Civil Procedure. In that paragraph he himself relied on the fact that the father Shib Charan Lal had been prosecuted (apparently at the instance of the appellant) for criminal breach of trust and complained that Shib Charan Lal had been acquitted owing to an improper interference with the criminal court by the civil court. In view of these allegations it is impossible to allow

(1) (1884) I.L.R., 6 All., 234.

(2) (1916) 14 A.L.J., 610.

(3) (1924) I.L.R., 46 All., 617.

1925

JAGANNATH
PRASAD
v.
JUGAL
KISHORE.

the appellant now to urge that the finding against him that the father misappropriated property is not a finding that he misappropriated that property criminally. This to our minds is sufficient to conclude the appellant's rights in this appeal. The finding as we interpret it in the light of the appellant's own interpretation is that the respondent's father had incurred this debt by committing criminal misappropriation. That brings the case within the principle of *Mahabir Prasad v. Basdeo Singh* (1) and this appeal must fail. It is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

1925
May, 22.

JOGAMAYA DASI (PLAINTIFF) v. TULSA AND OTHERS
(DEFENDANTS).*

Act No. IX of 1908 (*Indian Limitation Act*), schedule I, article 10—*Pre-emption—Limitation—Terminus a quo—House in possession of a tenant.*

A let certain land to B on a building lease. The lease was registered, and contained a covenant to the effect that if the lessee should sell any house that he might build on the land demised the lessor was to have a right of pre-emption. The lessee did sell a house which he had built in pursuance of the above-mentioned lease but, the house being in possession of a tenant, and thereafter of a son of the lessee, the vendee did not herself obtain possession thereof until a considerable time after the purchase had been completed.

Held on suit by A for pre-emption (1) that the vendee had constructive notice of the covenant giving the plaintiff a right of pre-emption, and (2) that limitation did not begin to run against the plaintiff until B's vendee obtained actual possession of the house. The same rule could not be applied to this case as was applicable in the case of property, such as an

* Second Appeal No. 1323 of 1924, from a decree of Fariduddin Ahmad Khan, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Allahabad, dated the 21st of July, 1924, confirming a decree of Muhammad Taqi Khan, Munsif of West Allahabad, dated the 28th of September, 1923.

(1) (1884) I.L.R., 6 All., 284.

undivided share in a mahal, which was naturally incapable of physical possession. *Gopi Nath v. Jeot Ram* (1), *Basdeo Rai v. Jhagru Rai* (2), *Muhammad Jan v. Fazal-ud-din* (3), *Chandan Singh v. Chandi Prasad* (4) and *Batul Begam v. Mansur Ali Khan* (5), referred to.

1925
JOGAMAYA
DASI
v.
TULSA.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Piari Lal Banerji, for the appellant.

Munshi Gulzari Lal, for the respondents.

LINDSAY and KANHAIYA LAL, JJ. :—The plaintiff is the widow of Babu Amrit Lal Kundoo. On the 22nd of February, 1891, Buddhu took a lease of a plot of land, measuring 3 biswas from Amrit Lal Kundoo for building a house on an agreement to pay a ground rent of Re. 1-8 per year. The lease provided that in case the lessee transferred the materials of the house built by him on the said land, the lessor shall have a preferential right of purchasing them for "a proper price" and that the transfer to any other person shall be valid only in case the lessor refused to take it.

On the 7th of June, 1921, the defendants Nos. 2 and 3, who are the legal representatives of Buddhu, one of the original lessees, sold one of the houses built on the land aforesaid to Musammat Tulsa for Rs. 150. The house was at that time in the occupation of a tenant, Musammat Sundar. Musammat Tulsa sent a notice to Musammat Sundar to vacate the house, which she did on the 13th of June, 1921, but before Musammat Tulsa could take possession of it, Mangru, the son of Buddhu, the original lessee, took possession of the house. A suit was then filed by Musammat Tulsa for his ejectment; and she got a decree in execution of which she obtained possession on the 18th of July, 1922.

(1) (1923) I.L.R., 45 All., 478.

(3) (1924) I.L.R., 46 All., 514.

(2) (1924) I.L.R., 46 All., 333.

(4) Weekly Notes, 1888, p. 227.

(5) (1898) I.L.R., 20 All., 315.

1925

JOGAMAYA
DASI
v.
TULSA.

The present suit was filed by the plaintiff for pre-emption of the said house on the 2nd of July, 1923. She relied on the covenant for pre-emption or option of purchase contained in the instrument of lease, and one of the questions raised in the suit was whether the claim was within time. There were other pleas raised in the case, the findings of the court of first instance on which were in favour of the plaintiff. The suit was, however, dismissed by that court on the ground that the claim was not within time, inasmuch as it was brought after the lapse of a year from the date of the registration of the sale-deed. The view taken by the lower appellate court was that as the house did admit of physical possession, the suit was within time from the date on which Musammatt Tulsa obtained possession; but it nevertheless proceeded to dismiss the claim because in its opinion the covenant for giving the lessor an option of purchase was not enforceable against the vendee. In support of the latter proposition it relied on the decision in *Gopi Nath v. Jeot Ram* (1). The finding of the lower appellate court was that the vendee had constructive notice of the covenant of pre-emption embodied in the registered instrument of lease; and that being the case, section 40 of the Transfer of Property Act applied; and as held in *Basdeo Rai v. Jhagru Rai* (2) and *Muhammad Jan v. Fazal-ud-din* (3), the covenant was enforceable against the vendee. Article 10 of the Indian Limitation Act (IX of 1908) provides a period of limitation of one year for a suit to enforce a right of pre-emption whether founded on custom or contract from the date when the purchaser takes physical possession of the whole property sold or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. The latter clause has

(1) (1923) I.L.R., 45 All., 478.

(2) (1924) I.L.R., 46 All., 333.

(3) (1924) I.L.R., 46 All., 514.

reference to the nature of the property which forms the subject of the sale; for, as held in *Chandan Singh v. Chandi Prasad* (1), if the subject of the sale by its nature admits of physical possession, the ability or inability of the vendor to place the vendee in actual possession of the property sold is not material and limitation does not begin till the possession is delivered. In *Batul Begam v. Mansur Ali Khan* (2) it was held by this Court that a share in an undivided zamindari mahal was not susceptible of physical possession within the meaning of article 10 of the Indian Limitation Act and constructive possession, for example, by the receipt of rent from tenants was not physical possession within the meaning of that article. That decision was upheld by their Lordships of the Privy Council in *Musammatt Batul Begam v. Mansur Ali Khan* (3). Their Lordships there pointed out that the corresponding article in Act XIV of 1859 provided a period of limitation of one year from the date of "possession," which was altered in 1871 to "actual possession" and that in 1877 the word "physical" was deliberately substituted for "actual" for a restrictive purpose. They observed that "actual possession", as applicable to an undivided share in a mahal, was not possible and that the words "physical possession" could only be deemed to imply personal and immediate possession, regard being had to the form in which the property may exist at the time of the sale. It can hardly be disputed that a house or a shop is capable of physical possession. Article 10 provides that in the case of such property, that is, property capable of physical possession, the limitation is computed from the date when the purchaser takes under the sale sought to be impeached physical possession of that property. The transfer of physical

1925
JOGAMAYA
DASI
v.
TULSA.

(1) Weekly Notes, 1888, p. 227.

(2) (1898) I.L.R., 20 All., 315.

(3) (1901) I.L.R., 24 All., 17.

1925
JOGAMAYA
DASI
v.
TULSA.

possession may take place at the time of the sale or at sometime later; but if the property admits of physical possession, the limitation does not start till the physical possession is actually taken. The question is not free from difficulty; but on a careful consideration of the two clauses as a whole, we are inclined to think that the rule applicable to property such as an undivided share in a mahal which is not by its nature capable of physical possession cannot be applied to houses and shops over which physical possession is always possible and practicable. The vendee here attempted to take physical possession but found that the house was occupied by a trespasser whom she was unable to eject till the 18th of July, 1922. From that date the suit was within time.

The appeal is, therefore, allowed and the claim of the plaintiff decreed subject to the payment of Rs. 150 into the court of first instance within three months from this date. In case of payment the plaintiff shall get her costs here and below from the defendant. In case of non-payment the suit will stand dismissed and the defendant vendee will get her costs from the plaintiff in all courts.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

1925
May, 26.

MUHAMDI BEGAM (DEFENDANT) v. TUFAIL HASAN
(PLAINTIFF).*

Civil Procedure Code, section 11—Suit for redemption of a usufructuary mortgage—Decree not providing for extinction of mortgagor's right to redeem—Second suit for redemption not barred.

A decree based on a compromise in a suit for redemption of a usufructuary mortgage contained the following provision :—" On payment of Rs. 225 to the defendant within one month of the date of the compromise the plaintiff would be entitled to get the property redeemed and to be put in possession, but after the expiry of the fixed period, he will be entitled to execute his decree on payment of Rs. 225. Parties shall bear their own costs."

The plaintiff failed to pay the amount in time and failed to apply for execution within three years. He then filed a second suit for redemption.

Held that, inasmuch as there was no provision in the former decree that the plaintiff's right to redeem should be extinguished, the mortgage still subsisted and the second suit was not barred. *Hari Ram v. Indraj* (1) and *Arura v. Bur Singh* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Baleshwari Prasad*, for the appellant.

Hafiz *Mushtaq Ahmad*, for the respondent.

SULAIMAN, and DANIELS, JJ. :—This is a defendant's appeal arising out of a suit for redemption. It appears that on a previous occasion the plaintiff instituted a suit for redemption of this very mortgage and obtained a compromise decree in December, 1916. The decree as framed was not in accordance with the compromise and was accordingly subsequently

* First Appeal No. 10 of 1925, from an order of Ganga Nath, First Subordinate Judge of Moradabad, dated the 5th of November, 1924.

(1) (1922) I.L.R., 44 All., 730.

(2) (1924) I.L.R., 5 Lah., 371.

1925

MUHAMMADI
BEGAM
v.
TUFAIL
HASAN.

corrected in April, 1924. The amended decree stood as follows :—

“ On payment of Rs. 225 to the defendant within one month of the date of the compromise the plaintiff would be entitled to get the property redeemed and to be put in possession; but after the expiry of the fixed period he will be entitled to execute his decree on payment of Rs. 225. Parties shall bear their own costs ”.

The plaintiff failed to pay the amount in time and failed to apply for execution within three years. He, however, has brought a second suit for redemption of that property. The trial court dismissed the suit holding that the claim was barred by the provisions of section 11 of the Code of Civil Procedure. On appeal the learned Subordinate Judge has taken the contrary view and remanded the case for trial of the other points involved in the case. In our opinion the view taken by the lower appellate court is correct. When it is borne in mind that the original mortgage-deed was a usufructuary mortgage, a suit for redemption of that mortgage, in spite of a default of payment of the mortgage money within the time fixed, can be brought. If there had been no compromise, the proper course would have been that the property would be sold and the mortgage money realized thereby. By mere lapse of the time fixed, the mortgagee does not become the absolute proprietor of the mortgaged property. The case, however, was compromised and the decree was passed in terms of the compromise. The compromise nowhere expressly stated that in default of the payment of Rs. 225 within one month the plaintiff's right to redeem would be extinguished or that his exclusive remedy would be to apply for execution. We may note that the decree as originally framed bore a clause that in default of payment his right to redeem would be extinguished, but the court

subsequently corrected this, holding that it was not in accordance with the compromise. It seems to us that when under the compromise the parties did not agree that the plaintiff's right to redeem would be extinguished absolutely, he is not prevented from bringing a second suit for redemption, and the mortgagee is still a mortgagee and has not become the absolute proprietary of the property. In support of our view we may refer to the case of *Hari Ram v. Indraaj* (1) which has been followed by the Punjab High Court in the case of *Arura v. Bur Singh* (2).

1925

MUHAMMAD
BEGAM
v.
TUFAIL
HASAN.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

1925

May, 27.

ZORAWAR SINGH AND OTHERS (DEFENDANTS) v. BHAGWAN SINGH AND ANOTHER (PLAINTIFFS).*

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 233 (k)—Partition—Specific property claimed in partition proceedings, but not given to applicant—Subsequent suit for declaration of ownership—Suit held to be barred.

The applicants for partition in a court of revenue asked, for reasons stated in their application, that certain specified property, recorded in the name of one D, might be assigned to themselves. The property claimed, however, after the partition was completed, still remained recorded in the name of D.

Held, on suit in a civil court for a declaration that the plaintiffs were the owners of the aforesaid property, that the suit was barred by section 233 (k) of the United Provinces Land Revenue Act, 1901.

Held, also, that the application of section 233 (k) is not limited to cases in which a question of proprietary right has

* First Appeal No. 160 of 1924, from an order of Shambhu Nath Dube, Subordinate Judge of Muttra, dated the 1st of August, 1924.

(1) (1922) I.L.R., 44 All., 730.

(2) (1924) I.L.R., 5 Lah., 371.

1925
ZORAWAR
SINGH
v.
BHAGWAN
SINGH.

been determined. *Ram Subhag Singh v. Dip Narain Singh* (1), *Gokaran Singh v. Ganga Singh* (2), *Nazir Ahmad v. Muhammad Sharif* (3), *Bhupal Singh v. Ujagar Singh* (4) and *Muhammad Sadiq v. Laute Ram* (5), referred to.

THE facts of this case sufficiently appear from the judgment of DANIELS, J.

Munshi *Narain Prasad Ashthana*, for the appellants.

Dr. *Kailas Nath Katju* and Pandit *Gopinath Kunzru*, for the respondents.

DANIELS, J.—The question for decision in this appeal is whether the present suit is barred by the provisions of section 233 (k) of the Land Revenue Act. The present suit is for a declaration that the plaintiffs are owners in possession of an area of 25·17 acres out of a khata of 104 acres in mahal Bhagwan Singh, mauza Sampat Jogi, and that the defendants are wrongly entered in the revenue papers as owners of the equity of redemption. The area of which the property in dispute forms a part was originally mortgaged to Sahib Singh, a collateral relative of the parties. The plaintiffs are sons of Gulab Singh, the head of another branch, and the defendants are the heirs of Durg Singh who represented a third branch of the family. The equity of redemption in this property was purchased in equal shares in the names of Durg Singh and Sahib Singh at some time subsequent to the mortgage.

On the 17th of March, 1909, the plaintiffs applied for partition of this property impleading Durg Singh, whose name they asserted to be fictitiously entered in the khewat and whom they asserted to have no proprietary interest in the property. There is on the record of the partition suit an application purporting to be

(1) (1921) I.L.R., 44 All., 74.

(2) (1919) I.L.R., 42 All., 91.

(3) (1924) I.L.R., 46 All., 453.

(4) (1920) I.L.R., 43 All., 88.

(5) (1901) I.L.R., 23 All., 201.

made by Durg Singh admitting that his name was fictitiously entered. The petition was not verified and in the partition as finally made Durg Singh continued to be recorded as proprietor of the area now in dispute and the sons of Gulab Singh as mortgagees. The trial court held that section 233 (k) applied and dismissed the suit. The lower appellate court has reversed this finding and remanded the suit for decision on the merits. The argument of the respondents, which found favour with the learned Subordinate Judge, is that as no question of proprietary right was raised by any co-sharer under section 111 or section 112, the question was never decided by the revenue courts, and further that section 233(k) cannot apply as the share in dispute and the share allotted to the plaintiffs were both included in one mahal.

It appears to us, however, that the rulings of this Court do not permit us to accept this contention. Section 233 (k) is not limited to the case in which a question of proprietary right has been determined under section 111. In this case the question of proprietary right involved was definitely raised by the plaintiffs in their application to the partition court, and, as the relief which they asked for in respect of this land was not granted, it must be deemed to have been refused. A Bench of this Court held in *Ram Subhag Singh v. Dip Narain Singh* (1) that the final allotment of land at a partition is conclusive even though the question of proprietary title which it is sought to raise in the civil suit was not directly raised and decided in the partition. We may refer to *Gokaran Singh v. Ganga Singh* (2). *Nazir Ahmad v. Muhammad Sharif* (3) is a recent instance of the application of the same principle. The learned Judges say:—"It seems to us that the legislature

1925

ZORAWAR
SINGH
v.
BHAGWAN
SINGH.
Daniels, J.

(1) (1921) I.L.R., 44 All., 74.

(2) (1919) I.L.R., 42 All., 91.

(3) (1924) I.L.R., 46 All., 453.

1925

ZORAWAR
SINGH
v.
BHAGWAN
SINGH.

has given the revenue courts exclusive jurisdiction over the partition of a mahal among recorded co-sharers . . . There is no doubt that if the plaintiffs had framed their suit so as to confine their claim merely to damages, they might have succeeded. But they have chosen to join this claim to a claim to obtain exclusive possession of certain specified plots, which undoubtedly are the subject of the partition."

In *Bhupal Singh v. Ujagar Singh* (1) the plaintiff sued for a declaration of his title to a pre-empted share which had not been allotted to him at the partition. The Letters Patent Bench, affirming the decision of the Judge who heard the appeal, held that the case was governed by the Full Bench ruling in *Muhammad Sadiq v. Laute Ram* (2) and that section 233 (k) was a bar to the suit. Whatever may be said against this rule, it has at least this great advantage that a revenue partition operates as a clearing up of disputed titles, and that a title declared at a partition may be safely relied on against all persons who were parties to the proceedings.

The course of decisions of this Court has now definitely established the principle that section 233 (k) debars civil courts from questioning the final allotment of land and title effected by means of a partition, and to depart from this rule would merely be to throw the law again into the state of uncertainty which formerly prevailed regarding it.

We think, therefore, that in the view of the scope of section 233 (k) which has been accepted by this Court, the appeal must be allowed and the decree of the trial court restored. We direct accordingly. The appellants will get their costs of this appeal.

SULAIMAN, J.—I concur in the proposed order. As the plaintiffs had definitely asked the partition

(1) (1920) I.L.R., 43 All., 38.

(2) (1901) I.L.R., 28 All., 291.

court to allot to them exclusively the property entered in the name of Durg Singh on the allegation that his name was fictitiously recorded and as the court did not grant their prayer, it must be deemed to have been refused. The plaintiffs cannot now re-agitate the same matter in the civil court.

1925

ZORAWAR
SINGH
v.
BHAGWAN
SINGH.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Boys and Mr. Justice Banerji.

1925
June, 2.

EMPEROR v. KAMLAPATI PANTH AND OTHERS.*

Act (Local) No. VI of 1920 (United Provinces Village Panchayats Act), section 71—Application to District Magistrate by persons convicted by a panchayat in a criminal case—Application returned without orders—Revision.

Certain persons who had been convicted by a village panchayat under section 323 of the Indian Penal Code applied in revision to the District Magistrate under section 71 of the United Provinces Village Panchayats Act, 1920. The District Magistrate, without giving any reasons, refused to pass any orders on the application and returned it to the petitioners with a direction that they should apply to the High Court.

Held, on application made to the High Court, (1) that the District Magistrate should have dealt with the application himself under section 71 of the United Provinces Village Panchayats Act, 1920, and (2) that there was no provision in the above-mentioned Act making the order of a District Magistrate under section 71 final.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Satish Chandra Das, for the applicants.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

* Criminal Revision No. 158 of 1925, from an order of the Panchayat held at Patti Taladesh, pargana Sor, district Almora, dated the 10th of December, 1924.

1925

EMPEROR
v.
KAMLAPATI
PANTH.

BOYS and BANERJI, JJ. :—In this case on the 10th of December, 1924, a panchayat held under the United Provinces Act (VI of 1920) convicted Kamlapati Panth, Parkhotam Panth and Sheo Datt Panth under section 323 of the Indian Penal Code and sentenced them to pay fines of Rs. 7, Rs. 5 and Rs. 5, respectively. The order of the panchayat refers to the statements of the complainant and two of his witnesses, and briefly to three witnesses produced on behalf of the accused. The order does not state whether the witnesses of the complainant or the witnesses of the accused are on their merits believed or disbelieved, but it continues—"on private inquiry, it appears that the accused used abusive language (against the complainant) and slapped him."

The next step was an application made by the accused to the Deputy Commissioner, Almora, under section 71 of the Local Act (VI of 1920). The principal objection set out in that petition to the order of the panchayat is to be found in paragraph No. 3 of the petition where it is alleged that "it appears that the panches made certain inquiries behind the back of the petitioners and without any information to them, upon which the panches' order is based". This appears to be a fair statement of the order of the panchayat. That petition had been duly stamped apparently on the 2nd of March, 1925, and it was filed in this Court on the 17th of March, 1925, with the revisional application with which we at present have to deal. We are informed by counsel for the applicants that the petition was presented to the Deputy Commissioner (Collector) of Almora but was returned to the applicants with a verbal intimation that they should go to the High Court. This instruction to counsel who has further communicated it to us is not supported by affidavit but we have no reason

to doubt the accuracy of the instruction given to counsel in view of the presence of the petition itself and its appearance. At the first hearing of this application on which Mr. *Das*, counsel for the applicant, was unable to be present we had to consider for some time the intricate question as to whether a village panchayat under Local Act No. VI of 1920 was a "court" and whether, if so, this Court had any power to interfere with its decisions. We had not at that time before us the history of the petition to the Collector to which we have referred.

1925
EMPEROR
v.
KAMLAPATI
PANTH.

It appears clear to us that our present order must be guided by the general principle that where a lower court has jurisdiction, an application must be made to that lower court first and its order obtained thereon before the superior court is asked to exercise such jurisdiction as it may think fit. In this case we have no information before us as to why the Collector refused to pass any orders on the petition and why he returned it to the applicants, if he did so, with instructions to apply to the High Court. We must, therefore, order the applicants to make their application again to the Collector accompanied by a copy of this order and invite the Collector to deal with it under section 71 of Act No. VI of 1920. That is sufficient for the disposal of this application.

But as we have had to consider at some length the question of the jurisdiction of this Court, we think that we should make some observations in regard thereto, though we are not unaware that those observations will be in the nature of *obiter dicta*. We should have little hesitation in coming to the opinion that a village panchayat constituted and held under Local Act (VI of 1920) is a "court" and, when it is dealing with a case in regard to an "offence", that it is a criminal court. The question whether this Court has any

1925
EMPEROR
v.
KAMLAPATI
PANTH.

jurisdiction to interfere with its orders is one of very much greater difficulty. It is clear from section 71 that "jurisdiction" to deal with the orders of a village panchayat is primarily given to the Collector. The only other section which throws any light on the matter at all appears to be section 53. That declares "there shall be no appeal from any decree or order passed by a panchayat in *any suit* under this Act, and, except as provided in sections 49 and 71, no court or authority shall have power to revise any such decree or order." Where they occur for the second time of course the words "any decree or order" refer back to those words where they occur for the first time, and the words "any decree or order" where they occur for the first time are clearly limited by the words "in any suit." The word "suit" is declared by section 3, subsection 9, to mean "a civil suit." Section 53 is therefore clearly confined to civil proceedings. We can find no provision in the Act declaring that the Collector's order under section 71 in "cases", *i.e.*, criminal proceedings, should be final. This is a matter for the consideration of the Legislature. The question is almost certain to recur.

For the reasons we have given above we order the petition of the applicants which is on the file now, dated the 2nd of March, 1925, to be returned to them for re-presentation to the Collector who in view of what we have said above will no doubt deal with it according to law under the powers vested in him under section 71.

Petition returned for re-presentation.

REVISIONAL CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

ZAHUR AHMAD AND ANOTHER (DEFENDANTS) v. TASLIM-

1925
May, 27.

UN-NISSA AND ANOTHER (PLAINTIFFS).*

*Civil Procedure Code, schedule II, rule 17—Arbitration—
Reference filed in court ultimately revoked owing to diffi-
culty in finding arbitrators—Acquiescence of parties—
Appeal—Revision.*

A Subordinate Judge, in whose court a reference to arbitration of a dispute outside the court had been filed, after various attempts to procure arbitrators who were willing to act, ultimately passed an order revoking the reference and dismissing the case. From this order an appeal was preferred to the District Judge, who entertained it and remanded the case to the court below.

Held, on application in revision to the High Court, (1) that no appeal lay to the District Judge, and (2) that as the Subordinate Judge's proceedings in connection with the arbitration had, as a matter of fact, been acquiesced in by the parties, the case was not one in which the final order could be interfered with in revision. *Bhagwan Das v. Gurdayal* (1) and *Fazul Ilahi v. Prag Narain* (2), referred to.

THE facts of this case sufficiently appear from the judgment of SULAIMAN, J.

Maulvi *Iqbal Ahmad*, for the applicants.

Munshi *Shiva Prasad Sinha*, for the opposite parties.

SULAIMAN, J.—This is a civil revision from an order passed in appeal by the District Judge. It appears that the parties had agreed to refer their disputes to the arbitration of two arbitrators and one umpire. There was considerable delay in the proceedings of the arbitrators, and ultimately the applicants filed an application under schedule II, rule 17, of the Code of Civil Procedure for the filing of the

* Civil Revision No. 169 of 1924.

(1) (1921) 19 A.L.J., 823.

(2) (1922) I.L.R., 44 All., 523.

1925

ZAHUR
AHMAD
v.
TASLIM-
UN-NISSA.

agreement of reference to arbitration. Notices were issued to the defendants to show cause why the agreement should not be filed, and on the 14th of July, 1923, the court passed an order under rule 17, filing the agreement, and made an order of reference to the arbitrators appointed in accordance with the provisions of the agreement.

An appeal was preferred to the District Judge from the order filing the agreement, and owing to the pendency of the appeal there was at first some delay in the proceedings. The record was not sent to the arbitrators for some time. It appears that subsequently the court came to know that all the arbitrators were not willing to arbitrate, and it invited a list of the arbitrators from the plaintiffs. The arbitrators named by the plaintiffs were not acceptable to the defendants and after hearing objections by both parties the court appointed Babu Raghbir Sahai, as the sole arbitrator in the case. This order was made on the 13th of September, 1923. This arbitrator did not make any award, and ultimately on the 27th of September, 1923, the court appointed the Government Pleader as the sole arbitrator. The Government Pleader made an award the very next day but this award, on some ground not necessary to set forth here, was set aside. After this, in December, the court again directed that the two arbitrators named in the agreement should be consulted as to whether they were willing to act or not with the Government Pleader as the umpire. The court was informed that at least one of the two arbitrators was not willing to act. It then passed an order, dated the 24th of October, 1923, revoking the order of reference and dismissing the suit. It was against this order that an appeal was preferred to the District Judge, who has allowed it and remanded the case.

In revision two points have been urged before us. The first is that no appeal lay to the District Judge who had no jurisdiction to interfere in the case at all, and the second is that even if an appeal lay to him, his order should not be upheld, inasmuch as the order passed by the Subordinate Judge was correct and just.

A preliminary objection was raised on behalf of the respondents that no revision lies from the order of remand passed by the District Judge. This objection cannot be entertained because the District Judge has finally disposed of the matter pending before him.

We are of opinion that this was not a case in which an appeal lay to the District Judge. The Subordinate Judge had previously passed an order filing the agreement. An appeal from that order was preferred and dismissed. The ultimate order passed by him revoking the reference and dismissing the suit would not be appealable unless it came under section 104 of the Code of Civil Procedure. Section 104 (1) (a) cannot apply because the order was not one superseding the arbitration where the award had not been completed within the period allowed by the court. The fact was that the court found that as the arbitrators named were not willing to act it was futile to appoint new arbitrators. Nor did it come under sub-clause (d), because the order was not an order refusing to file an agreement to refer to arbitration. An appeal from an order superseding the agreement is limited by the provisions of section 104 (1) (a) of the Code of Civil Procedure. The order passed by the Subordinate Judge was of course not a decree and was not appealable as such.

We have, however, been invited to interfere with the order passed by the Subordinate Judge in revision. It is unnecessary in this case to decide the question whether when one of the arbitrators named in the

1925

ZAHUR
AHMAD
v.
TASLIM-
UN-NISSA.

1925

ZAHUR

AHMAD

v.

TASLIM-
UN-NISSA.

agreement has refused to act and has died an agreement can or cannot be filed under rule 17. The parties respectively rely on two cases of this Court. One is the case of *Bhagwan Das v. Gurdayal* (1) and the other is *Fazal Ilahi v. Prag Narain* (2). In the present case, however, the agreement was filed under rule 17. The agreement having been filed under rule 17, the provisions of rule 19 became applicable. Assuming, therefore, that rule 5 was applicable and the court ought to have proceeded in strict accordance with the provisions of that rule, it cannot be doubted that even if the procedure adopted by the court was irregular, the parties acquiesced in it and waived their objection. The plaintiffs themselves nominated a number of arbitrators and ultimately the court decided to appoint one gentleman as the sole arbitrator. After that the only question was whether, if the arbitrator so appointed refused to act, the court should not appoint another in his place. The order passed by the court would therefore be an order passed under schedule II, rule 5 (2) making an order superseding the arbitration. As there was no suit pending before it, it could not of course proceed with the suit. We are informed that Raza Ahmad has already instituted a suit, to which the other applicant has been made a party, to enforce his rights which were referred to arbitration under the agreement. Under these circumstances we find it difficult to set aside the order of the Subordinate Judge on the ground of irregularity which was acquiesced in, and submitted to, by all the parties.

We accordingly allow this application in revision, and setting aside the order of the District Judge, restore the order of the Subordinate Judge. As no objection was raised before the District Judge that

(1) (1921) 19 A.L.J., 823.

(2) (1922) I.L.R., 44 All., 523.

no appeal lay to him, we direct the parties to bear their own costs of this revision.

DANIELS, J.—I concur. My reason for holding that a revision lies from the order of the District Judge is this. The respondents' objection is that no revision lies because no case has yet been decided. The case had in fact been decided by the Subordinate Judge in a final order from which no appeal lay, and when the District Judge entertained an appeal from that order which he had no jurisdiction to entertain and set it aside, his order is certainly open to revision by this Court.

Application allowed.

Before Mr. Justice Sulaiman.

BHAKTA SHIROMANI (DEFENDANT) v. SITAL NATH
(PLAINTIFF).*

1925

ZAHUR
AHMAD

v.

TASLIM-
UN-NISSA.

1925

May, 29.

Master and servant—Servant in default—Servant dismissed without notice, but for good cause—Servant not entitled to wages beyond date of dismissal.

Where a servant paid by the month is dismissed by his master in the middle of a month without notice, but for a reason which justifies the master in so dismissing him, he is not entitled to wages for the broken part of the month during which he did attend to his duty. *Rughoonath Doss v. Mr. T. Halle* (1) and *Ralli Brothers v. Ambika Prasad* (2), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Bhagwati Shankar*, for the applicant.

The opposite party was not represented.

SULAIMAN, J.:—This is a revision from a decree of a Court of Small Causes. The plaintiff came to court on the allegation that he was employed as a

* Civil Revision No. 43 of 1925.

(1) (1871) 16 W.R., C.R., 60.

(2) (1912) I.L.R., 35 All., 132.

1925
BHAKTA
SHIROMANI
v.
SITAL NATH

compositor in the defendant's press at a salary of Rs. 17 per month and that he was dismissed on the 20th of January, 1925, without notice. He claimed the pay for the twenty days he served and an additional pay for fifteen days as he was dismissed without previous notice. The suit was contested by the defendant and all liability was denied. The learned Judge of the Court of Small Causes has granted the plaintiff a decree for his pay for twenty days and dismissed the rest of the claim.

The findings, which I must accept, are as follows:—The plaintiff worked in the defendant's press up to the 20th of January, on which date, at about 12 o'clock, he, having got fever, disappeared from the press without applying for leave. He did not turn up for 5 or 6 days, and as he had disappeared without leave or sanction and had left the work, the defendant was much irritated and dismissed him. The court below finds that the plaintiff committed default and the defendant was justified in dismissing him. In spite of this finding it has granted the plaintiff a decree for his wages for 20 days.

As I have said, it was admitted by the plaintiff in the plaint that he was engaged on a monthly salary of Rs. 17. On the findings he left the work without leave and without sanction of the defendant and did not turn up for 5 or 6 days. The defendant was justified in dismissing him. If the conduct of the plaintiff was such that it justified the defendant in dismissing him before the expiry of the month, the plaintiff, in my opinion, was not entitled to his salary for even the broken period for which he had served.

In the case of *Rughoonath Doss v. Mr. T. Halle* (1), although the claim of the servant for wages for the

(1) (1871) 16 W.R., C.R., 60.

broken period during which he had served was allowed, it was pointed out that he would not have got it if the master could prove that the dismissal was justifiable.

1925
BHAKTA
SHIBOMANI
v.
SITAL NATH.

In the case of *Ralli Brothers v. Ambika Prasad* (1) TUDBALL, J., held that an office clerk engaged on a monthly salary was not entitled to any salary for the broken portion of the month in the course of which he left the service without the consent of his employer.

The present case is certainly distinguishable inasmuch as the plaintiff here did not actually leave the service but left the work which justified the master in dismissing him. But the English Law governing the rules and liabilities of master and servant is to be found in Smith's Law of Master and Servant, sixth edition, pp. 169—172. In the absence of any statutory provisions in India, the common law of England would prevail. It is there laid down that

“ when a servant, whose wages are due periodically, so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last payment of wages. That is to say, if a servant whose wages are only due yearly, absconds from his master, or is rightfully discharged before the expiration of the year, he could recover nothing for services rendered previous to such departure or discharge. And the same principle would apply to the case of a quarterly, monthly or weekly hiring ”.

The governing principle seems to be that the contract is that the servant should perform his part of the contract for the whole period for which wages are paid and that if he fails to perform his part of the contract or is rightfully discharged at any intervening period between the dates when his wages are due, he can recover nothing for the broken period of service.

(1) (1912) I.L.R., 35 All., 132.

1925

BHAKTA
SHIROMANI
v.
SITAL NATH.

The learned author cites several English cases where servants, who have been rightly discharged and have afterwards sued their late masters for wages, have failed to recover anything.

I am, therefore, of opinion that in view of the findings of the court below that the default was committed by the plaintiff and that his master was justified in dismissing him, the plaintiff was not entitled to recover the wages for even twenty days during which he had served. The judgment of the court below, therefore, is not according to law. I allow the revision and set aside the decree of the court below and dismiss the suit. As the applicant professes to have contested the suit mainly on principle, I direct that the parties should bear their own costs of this application and in the court below.

Application allowed.

APPELLATE CIVIL.

1925
June, 1.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

SHIAM LAL (DEFENDANT) v. RADHA BALLABH AND OTHERS (PLAINTIFFS) AND BALMAKUND AND OTHERS (DEFENDANTS).*

Joint property—Improvement made in good faith by one co-sharer—Partition—Compensation for improvements—Set-off on account of use and occupation by the party claiming compensation.

In 1911 one R. C. purchased a ruined house and spent a considerable sum of money in re-building it. In so doing he apparently acted in the belief that his vendors were the sole owners and that he had acquired a complete title. In 1914, however, some other members of the vendors' family appeared

* First Appeal No. 142 of 1922, from a decree of Ganga Sahai, Subordinate Judge of Muttra, dated the 30th of January, 1922.

and succeeded in obtaining a decree for joint possession of the house, but in that suit the question of what compensation, if any, the purchaser was entitled to was left open. In 1920 the successors in interest of the plaintiffs to the suit of 1914 brought a suit for partition, and in that suit the court directed that the house should be sold and the proceeds divided amongst the parties interested. The principal defendant, who was the representative of the original purchaser, claimed compensation for the money spent on re-building the house, and, being refused compensation, appealed.

1925

SHIAM
LAL.
v.
RADHA
BALLABH.

Held that the defendant's predecessor had acted in good faith and without any intention of embarrassing the other co-sharers in the property, and the defendant was therefore entitled to compensation; but in estimating such compensation the plaintiffs on their side were entitled to some set-off on account of the use and occupation of the house by the defendant.

The principles governing the award of compensation on a partition discussed.

THE facts of this case are fully stated in the judgment of the Court.

Munshi Narain Prasad Ashthana, for the appellant.

Dr. Kailas Nath Katju, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. :—The subject-matter of the dispute in this case is a three-storeyed house situated in the town of Muttra. On the 20th of May, 1911, the site of this house and certain materials were sold by two separate deeds of sale. The site of the house was sold to one Ram Chand or Ram Chandar who is the own brother of the present appellant Shiam Lal. The materials were sold to a man named Jamna Das and were afterwards sold by him to Ram Chandar the man whose name has just been mentioned. The site was sold for Rs. 400 and the materials for Rs. 250.

Both these sale-deeds are printed at pages 21 *et seq* of our record. The vendors were Gopal Das and

1925

SHIAM

LAL

v.

RADHA
BALLABH.

his son Piare Lal. The latter was acting for himself and for his two minor sons.

It appears that after these sales took place, Ram Chandar re-built the house. Then in the year 1914 a suit was filed by Mitthu Lal and others who were members of the family of Gopal Das. This suit was brought in the court of the Additional Subordinate Judge of Muttra on the allegation that the sales made by Gopal Das, his sons and grandsons were not binding inasmuch as the property which had been sold was joint family property. The plaintiffs alleged themselves to be members of a joint family with Gopal Das, and they therefore asked that the deeds of sale might be cancelled and that Ram Chandar might be ejected from the premises.

Ram Chandar defended this suit and raised a variety of pleas. He denied that the family of the plaintiffs and Gopal Das, his vendor, was a joint family. He denied that the property was joint family property and pleaded that he had acquired the whole of these premises from Gopal Das. He set up a defence under section 41 of the Transfer of Property Act and pleaded, moreover, that in no case could he be ejected without payment by these plaintiffs of the sum of Rs. 5,000, the amount which he had spent on the re-erection of the house.

This suit was decreed in the court of the Subordinate Judge of Muttra to this extent, namely, that the plaintiffs were given a decree for joint possession of the premises. That decree was upheld in appeal in this Court by the judgment in F. A. No. 199 of 1916 which was delivered on the 2nd of January, 1919.

Mitthu Lal and his co-plaintiffs having thus got a decree for joint possession, the suit out of which this appeal has arisen was instituted in November, 1920, by

- Radha Ballabh and others, some of the successors in interest of the plaintiffs in the earlier suit. The suit is a suit for partition. The learned Subordinate Judge has ordered the sale of the premises and has directed distribution of the sale proceeds according to the shares of the parties. We gather from the judgment of the court below that Shiam Lal, the defendant appellant, now owns 45/72 of the house. Shiam Lal, it may be mentioned, alleged that in a partition arrived at between himself and his brother, Ram Chandar, this house had fallen to his share. It further appears that since the date of the earlier suit Shiam Lal or his brother, Ram Chandar, had been buying in some of the shares of the other co-tenants.

1925:

SHIAM
LAL
v.
RADHA
BALLABH.

One of the claims made by the defendant appellant Shiam Lal in this suit for partition was that he was entitled to claim from the plaintiffs a sum of Rs. 5,500 on account of improvements which he had made on the property. The Subordinate Judge came to the conclusion that it might be inferred that he had spent a sum of Rs. 5,000 on rebuilding these premises. Compensation, however, was refused to Shiam Lal on the ground that he and his predecessor, Ram Chandar, were only trespassers and that he laid out the money at his own risk.

It is this finding which is contested here and it is argued on behalf of Shiam Lal that the judgment of the court below is erroneous. It is said that in these partition proceedings he is entitled in equity to compensation for the money he laid out in restoring these premises.

On the other side it has been argued that this question of compensation is no longer open in view of the findings which were come to in the earlier suit of 1914 to which we have referred.

1925

SHIAM
LAL
v.
RADHA
BALLABH.

A copy of the judgment of the Additional Subordinate Judge in that earlier suit is to be found at page 27 of our record. In that case the learned Subordinate Judge was asked to hold that the plaintiffs could not recover possession of the premises without paying to Ram Chandar the money which he had laid out in rebuilding the house. The learned Subordinate Judge refused to decide this question. He stated that at that stage it was not necessary to decide this issue but that subsequently in a partition suit, if the rules of equity would allow, Ram Chandar would be entitled to receive compensation for repairs and improvements effected by him.

When the case came up to the High Court the same plea was again raised on behalf of Ram Chandar, and this Court agreeing with the judgment of the court below, was of opinion that Ram Chandar could not demand that the plaintiffs in that suit should pay him money for compensation as a condition precedent to their getting a decree for possession.

We have considered carefully the judgments in this earlier suit and we are of opinion that there is no solid foundation for the argument that the question of this claim to compensation as now raised is *res judicata* between the parties. All that was held in the earlier case was that Ram Chandar, who was then in possession of the house, could not insist that the plaintiffs should pay him compensation before they were entitled to get joint possession. It seems to us that the question of any compensation which might be allotted at the time of partition was left open in these earlier proceedings.

We have now to consider what the law is regarding a claim of this kind. We have been referred in the course of argument to a treatise by a learned

American author, "Freeman on Co-tenancy and Partition." According to this learned author the law is as follows:—We quote from paragraph 509 at page 678 of the book:—

1925

SHIAM
LAL
v.
RADEHA
BALLABH.

"The fact that a co-tenant has located upon a particular portion of the lands of the co-tenancy and has enhanced its value by making improvements or by reducing it from a wild state to one fit for profitable cultivation, is a circumstance always deemed worthy of the attention of a court charged with the duty of making a partition. . . . The law declines to compel one co-tenant to pay for improvements without his authorization but it will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premises the fruits of his expenditure and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. It is the duty of equity to cause these improvements to be assigned to their respective owners (whose labour and money have been thus inseparably fixed on the land) so far as can be done consistently with an equitable partition."

Continuing in paragraph 510 the learned author quotes the opinion of the Supreme Court of the State of New York in the following language:—

"Where one tenant-in-common lays out money in improvements on the estate, although the money so paid does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant-in-common to an allowance on a partition in equity for the improvements made on the premises it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements and their refusal. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property and not for embarrassing his co-tenants

1925.

SHIAM
LAL
v.
RADHA
BALLABH.

or encumbering their estate or hindering partition. But if one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land, because it would be the improver's own folly to extend his own improvements over the whole estate and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case the improver stands as mere volunteer and cannot without the consent of his co-tenant lay the foundation for charging him with improvements."

From the above statement of the principles which govern the award of compensation on partition it is apparent that the real difficulty arises in those cases where, as here, the property is not susceptible of physical division. In the present instance we find that the house in dispute, although of three storeys, is not a large house, and as the co-sharers are many it would be quite impossible to make any physical division of the premises and so the learned Judge has been obliged to resort to the provisions of the Partition Act of 1893 and to direct a sale with the further direction that the sale proceeds are to be divided between the interested parties.

It is laid down in the above statement of the law that it is essential that the person claiming compensation should have acted in good faith. In the present case we think it may fairly be said on behalf of Shiam Lal or his predecessor that he acted in good faith in the sense contemplated, that is to say, he made the "improvements" honestly for the purpose of improving the property and not in order to embarrass the other co-tenants or to encumber their estate or to hinder partition. He had no such object in view, for

apparently he was under the impression that by the purchase made in the year 1911 he had become the owner of the whole of the estate. The law as stated in the quotation made above relates to claims for compensation on account of "improvements." In this present case it is we think possible to say that the matter stands on a somewhat different footing, for if carefully examined it seems to us that what have been called improvements in the course of the trial were really repairs. It is clear on all hands that when the appellant's predecessor bought these premises the property was in ruins. There is evidence to show that a long time before the purchase was made the house had been a three-storeyed house. When Ram Chandar bought in the year 1911 the two upper storeys had disappeared—there was only the lowest storey and that was in ruins, and it is quite clear that as matters then stood the property was quite useless and unprofitable. It may be mentioned here that Gopal Das and the other members of the very large family to which he belonged did not reside in Muttra; some of them we are told resided in the Aligarh District and others of them at Calcutta, and it seems reasonable to suppose, and there is evidence to that effect, that these people, being absentees, had neglected these premises and allowed them to fall into decay. We find then that Ram Chandar buys these premises in a state of ruin and thereby becomes a co-tenant. He spent a sum of money in reinstating the premises and making them fit for occupation. Having regard to all these circumstances we think that he may fairly be held entitled to some compensation for reinstatement. He has, by the money he has laid out, converted this building into something which is of use and which can bring in profit. In the state it stood when he purchased it was worth little or nothing at all.

1925

SHIAA
LAL
v.
RADHA
BALLABH.

1925

SHIAM
LAL
v.
RADHA
BALLARI.

We have decided, therefore, that in the circumstances to which we have referred, the defendant appellant is entitled to some compensation, and we now proceed to determine what the amount of that compensation should be.

There is no very definite evidence on this point on the record but in his own statement which is to be found at page 11 of the record Shiam Lal stated that he had spent Rs. 5,000 or Rs. 6,000 in restoring these premises. This restoration, he said, had taken place some ten years before the date on which he was giving his evidence. That would fix the date of the restoration in or about the year 1912. Obviously Shiam Lal was not able to produce any detailed account of his expenditure on these particular premises. It seems from his deposition that at that time he built three other houses as well and that he had spent some Rs. 25,000 in erecting all four. He called two witnesses, Parbhu Lal and Munshi Abdullah, one of whom is a contractor and the other a sub-overseer, and these men were examined with reference to an estimate which is printed at page 38 of our record and marked Ex. A. It may be mentioned here that both these men were called as witnesses in the earlier suit of 1914 and that this very estimate was produced in that case. Both these men who have some pretensions to be experts and who drew up this estimate jointly, fixed the cost of rebuilding these premises at Rs. 5,480. Of course when all is said and done this is an estimate only. They themselves have no direct knowledge of the money that was actually spent in rebuilding the house. It was on these materials that the court below came to the conclusion that in all probability Shiam Lal's predecessor, Ram Chandar, had spent about Rs. 5,000 in reinstating the property now in dispute, and all things considered, we are of opinion that the

conclusion of the Subordinate Judge is substantially correct. We should, therefore, be prepared to allow Shiam Lal a sum of Rs. 5,000 by way of compensation, but there is another fact which is to be taken into account and that is that Shiam Lal and his predecessor, so far as we can see, have had the exclusive use of these premises for a considerable period. We do not know on the present state of the record whether the plaintiffs who are now seeking partition have received from Shiam Lal any profits accruing since the time when they were admitted to joint possession under the decree of this Court. We may refer in this connection again to paragraph 510 of Freeman's book where, dealing with the question of compensation for improvements, the author says :—

1925
SHIAM
LAL
v.
RADHA
BALLABH

“ The co-tenant against whom the improvements are charged will therefore be charged not with the price of the improvements but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum of which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements.”

We feel, therefore, that we must allow these plaintiffs some set-off on account of the use and occupation of these premises by the appellant and his predecessors. No definite material is to be found on the record but we think, having regard to the value which is put upon the premises and to the probable rent which a building of this description would bring in, we shall not be doing the defendant any injustice if we hold that during the period of his occupation he has recouped himself to the extent of Rs. 1,000. Deducting this sum of Rs. 1,000 from the Rs. 5,000 just mentioned we come to the conclusion that the appellant is entitled to compensation to the extent of Rs. 4,000 from the sale proceeds. The decree of the

1925

SHIAM
LAL
•
RADHA
BALLABH.

court below, therefore, is modified and it is now declared that on sale of these premises the defendant appellant will be entitled to deduct Rs. 4,000 out of the sale proceeds. The balance can then be distributed amongst the various co-owners in proportionate shares. As regards costs we leave the parties to pay their own costs in both the courts.

Decree modified.

1925

June, 8.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BRIJ RAJ AND OTHERS (PLAINTIFFS) v. RAM SARUP AND OTHERS (DEFENDANTS).*

Guardian ad litem—Suit by minor defendant to avoid the effect of proceedings taken against him on the ground of negligence of his guardian ad litem—Nature of the negligence which would entitle minor to a decree.

“Gross negligence,” which may be interpreted as culpable neglect of the interests of a minor defendant, on the part of his guardian *ad litem* will entitle the minor to the avoidance of proceedings undertaken against him. But it is not every kind of negligence nor every degree of negligence which will render proceedings otherwise regular and proper liable to be reopened. It must be such negligence as leads to the loss of a right which, if the suit had been resisted with due care, must have been successfully asserted. It is not sufficient to show that the guardian *ad litem* absented himself; it must also be proved that there was an available good ground of defence which was not put forward owing to the default of the guardian *ad litem* to appear at the trial. Or, to put the matter differently, the nature of the duty demanded from the guardian *ad litem* may vary according to the nature of the case in which he is called upon to act. An omission to defend or to raise a particular plea or to call certain evidence might in the circumstances of a particular case amount to negligence or to a breach of the duty which was owing by the guardian *ad litem* to the infant in that case. In different

* First Appeal No. 88 of 1924, from a decree of Rup Kishen Agha, Subordinate Judge of Budaun, dated the 22nd of November, 1923.

circumstances such an omission might not amount to negligence. The thing to be regarded in each circumstance is the interest of the minor.

1925
BRIJ RAJ
v.
RAM
SARUP.

Lalla Sheo Churn Lal v. Ramnandan Dobey (1), *In re Hoghton* (2), *Ram Sarup Lal v. Shah Latafat Hossein* (3), *Gregory v. Molesworth* (4), *Wilson v. Brett* (5), *Hinton v. Dibbin* (6), *Parmeswari Pershad v. Sheo Datt Rai* (7) and *Baboo Lekhraj Roy v. Baboo Mahtab Chand* (8), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Sir *Tej Bahadur Sapru*, Dr. *N. C. Vaish*, and *Munshi Harnandan Prasad*, for the appellants.

Mr. *S. A. Haidar*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ.:—This litigation has its origin in a deed of sale executed on the 30th of September, 1914, by one Sita Ram and his mother Musammat Parbati in favour of Haji Muhammad Ghafur Bakhsh, by which the executants purported to convey certain shares in kasba Ujhani and mauza Mahona for a sum of Rs. 13,110 in order to satisfy certain debts and to meet personal expenses. It was represented in the document that the houses in which the vendors were living had been advertised for sale and had to be saved. It was stated, moreover, in the deed that Sita Ram was the only heir of Musammat Parbati and that he and she were competent to sell the property. Sita Ram further stated that he had an only son, Deo Dat, who had given his consent to the sale. This was a false statement, for it appears that he had no less than eight sons.

In the deed of sale details of the consideration are set out. It appears that there were a number of debts owing which the vendee undertook to pay, and amongst

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| (1) (1894) I. L. R., 22 Calc., 8. | (2) (1874) L. R., 18 Eq., 573 (576). |
| (3) (1902) I. L. R., 29 Calc., 735. | (4) (1747) 3 Atk., 626. |
| (5) (1843) 11 M and W., 113. | (6) (1842) 2 Q. B. R., 646 (661). |
| (7) (1907) 6 C. L. J., 448. | (8) (1871) 14 Moo., I. A., 393. |

1925

BRIJ RAJ

v.

RAM
SARUP.

these was a decretal debt for Rs. 1,750 owing to one Kanhaiya Lal.

Ghafur Bakhsh had some trouble in obtaining mutation on the basis of this document. It appears that the other sons of Sita Ram intervened and made trouble and all this resulted in criminal proceedings taken both by Ghafur Bakhsh and by the sons of Sita Ram. Eventually in the early part of March, 1915, (about 15th March) Ghafur Bakhsh got possession and mutation.

On the 30th of September, 1915, one Shankar Prasad filed a suit to pre-empt this sale. One of the defendants to this suit was Ghafur Bakhsh and another was his wife Musammat Rashida Khatun. The reason why this lady was impleaded was that after the sale of the 30th of September, 1914, and before the suit for pre-emption was brought she had purchased in execution of a decree a share of the Mahona property which had already been sold to her husband. We have already mentioned that there was a decree in favour of one Kanhaiya Lal for Rs. 1,750. It seems that after the execution of the sale-deed in his favour Ghafur Bakhsh failed to pay off this debt and Kanhaiya Lal took out execution and brought the property which had been mortgaged to him to sale. It was purchased on the 21st of January, 1915, by Rashida Khatun for Rs. 792 and the sale was confirmed on the 13th of March, 1915.

The pre-emption suit brought by Shankar Prasad was decreed on a compromise on the 3rd of January, 1916. Under this decree Shankar Prasad was directed to pay Rs. 3,074-7-0 to Ghafur Bakhsh and his wife; this sum representing all the consideration which had actually passed from these purchasers and including the Rs. 792 which Rashida Khatun had paid for the property in the execution sale.

We now come to the 31st of October, 1917, on which date there was filed a suit brought by five sons of Sita Ram for the purpose of recovering the property. This suit was Suit No. 185 of 1917. Shankar Prasad the pre-emptor died just after this suit was filed and his sons and grandsons were made defendants in his place. One of these sons was Bansidhar and two of Bansidhar's sons were Brij Lal and Lallu who were both minors and for purposes of the suit Bansidhar was appointed their guardian *ad litem*.

The sons of Sita Ram, who were the plaintiffs, alleged that the property sold on the 30th of September, 1914, was joint ancestral family property; that Sita Ram had no right to sell and that there was no legal necessity for the sale. The sons and grandsons of Shankar Prasad contested the claim on a variety of grounds. The case was fought out to a finish in the court of the Subordinate Judge of Budaun who held that legal necessity had been proved to some extent. The result was that he gave a decree by which the defendants were to be entitled to retain possession of the property if they paid Rs. 2,094 into court for payment to the plaintiffs. If they failed to do so, then the plaintiffs were to be entitled to recover possession from the defendants on payment into court of a sum of Rs. 7,845-8-0.

The plaintiffs appealed against this decree to this Court (F. A. No. 161 of 1919) and the defendants filed cross-objections. The hearing of the appeal occupied a considerable time and it was found necessary to call for a finding on an issue which had not been tried out by the Subordinate Judge, namely, whether the property in dispute or any part of it was joint ancestral family property.

After receipt of the finding this Court decided that out of the item of Ujhani property sold on the

1926

BRIJ RAJ

v.
RAM
SARUP.

1925
BRIJ RAJ
v.
RAM
SARUP.

30th of September, 1914, a 4 biswansi odd share was the separate property of Sita Ram, having come to him by collateral inheritance and which he was, therefore, competent to sell without any interference on the part of his sons and grandsons.

The result was that this Court varied the decree of the trial court. It dismissed the claim of the plaintiffs with respect to the 4 biswansi share just mentioned and for the rest declared that the plaintiffs could get possession on payment into court within four months of Rs. 3,189-8-0, that being the sum in respect of which legal necessity was held to have been established.

It appears from the High Court judgment that another plea was raised on behalf of the defendants respondents at the stage of appeal with reference to the share in mauza Mahona, which, as we have said above, was purchased in execution of Kanhaiya Lal's decree by Rashida Khatun on the 21st of January, 1915. It was pointed out that Kanhaiya Lal's decree for Rs. 1,750 had been obtained against Sita Ram and his sons and grandsons. The decree was a decree for sale on a mortgage and a copy of it was on the record bearing date 1st of September, 1913. It was urged, therefore, that as this decree bound Sita Ram and his family and as the property had been sold in execution and had passed out of the family, Sita Ram's sons could not recover it. This Court held that this claim might have been a good one had it been raised at the proper time, namely, by a plea in the written statement and had the plaintiffs been given notice of the plea. As this, however, had not been done, this Court refused to go into the matter at the stage of the appeal.

Taking the hint from the observations of the Court in its judgment in F. A. No. 161 of 1919 the present

suit (Suit No. 40 of 1923) was launched by Brij Lal and Lallu, sons of Bansidhar, who were parties to the earlier litigation and by another minor son of Bansidhar who was not in existence when the earlier suit was brought.

1925.

BRIJ LAL
v.
RAM
SARUP.

The object of this suit is to obtain a declaration that the decree in the previous Suit No. 185 of 1917 is not binding on the plaintiffs, and in the plaint as filed that relief was sought on the following grounds :—

It was alleged in paragraph 5 of the plaint that in the earlier suit the defendants second party (which includes Bansidhar, the father of the present plaintiffs) “ did not take necessary and legal objection with regard to the property sold by auction nor did they produce any evidence in respect thereof.” This plea relates to the share in Mahona which was purchased by Rashida Khatun in execution of Kanhaiya Lal's decree.

In paragraph 6 of the plaint it was alleged that the defendants second party (including Bansidhar) acting in collusion with the defendants first party (the sons and grandsons of Sita Ram) “ did not produce evidence in support of legal and family necessity although they were called upon to do so, nor did they prove the necessity for the antecedent debts nor did they take any proceeding to safeguard the interests of the plaintiffs.”

In paragraph 7 it was pleaded that owing to the negligence and dishonesty of the defendants second party, Suit No. 185 of 1917 was ultimately decided against the plaintiffs who were deprived of all the property except the 4 biswansi odd share in Ujhani.

In the 8th paragraph of the plaint it was set out that by reason of the negligence of the defendants second party and their dishonesty and collusion

1925.
BRIJ RAJ
v.
RAM
SARUP.

with the defendants first party in the earlier suit the decree was not binding. The suit was contested by the defendants first party, that is to say, the representatives of Sita Ram, who denied all the allegations of negligence and collusion and pleaded that the present suit was collusive. No written defence was filed on behalf of the defendants second party, that is to say the sons and grandsons of Shankar Prasad including Bansidhar.

The written statement filed by the first set of defendants was put in on the 9th of May, 1923. On the 24th of July, 1923, the Subordinate Judge of his own motion examined a person named Ajudhia Prasad or Ajudhia Saran, who was the *paikar* of the plaintiffs, and later on, that is to say, on the 18th of September, 1923, he examined one of the defendants second party, Pandit Ajudhia Prasad, who is an uncle of the plaintiffs. Why he examined Pandit Ajudhia Prasad is not apparent, for this man did not represent the plaintiffs in the earlier suit. As we have said, they were represented by their own father Bansidhar, who is alive and is a party to the present proceedings.

After these two persons had been examined, the plaintiffs on the 2nd of October, 1923, applied for amendment of the plaint. They asked that the allegations of collusion and dishonesty made against the defendants second party might be struck out of the plaint and asked for the addition of a fresh paragraph, paragraph 8A, in which it was alleged that there had been dishonesty on the part of a certain karinda, Narain Das, who had been employed by the defendants second party.

On the 4th of October the Subordinate Judge disposed of this application. He allowed the allegations of dishonesty and collusion to be struck out from

the plaint, but he refused to allow the addition of a new paragraph to the plaint, *viz.*, paragraph 8A, though, strangely enough, in spite of this order the addition to the plaint was made and initialled by the Subordinate Judge.

Without calling for any other evidence on the issue of negligence which he had already framed, the Subordinate Judge dismissed the suit on the 2nd of November, 1923, on the finding that there had been no such negligence in the conduct of the earlier suit on behalf of the plaintiffs as would justify a declaration that the decree was not binding on them.

We have now this appeal before us in which the judgment of the Subordinate Judge is attacked on various grounds. We do not, in view of the order we are about to pass, propose to discuss at any length at the present moment all the pleas which are set out in the memorandum of appeal. We do not approve of the method by which the Subordinate Judge has disposed of the case. Having framed an issue regarding the question of negligence he proceeded to dispose of it on the evidence of two witnesses of his own choosing and that, in our opinion, was not a proper thing to do. It was open to him, of course, to decide upon the allegations in the plaint that the negligence which was assigned could not constitute a cause of action for the suit, but that is not the course which has been followed. We find it necessary, therefore, to remit issues which will be decided after giving both sides opportunity to produce evidence, but before we proceed to do so we think it expedient to make certain observations concerning the questions which arise for disposal.

We would say, in the first place, that the complaint laid in the 5th ground of the memorandum of

1925.

BRIJ RAY

v.
RAM
SARUP.

1925.

BRIJ RAJ
v.
RAM
SWARUP.

appeal to the effect that the Subordinate Judge should have allowed amendment of the plaint as asked for by the plaintiffs is not well founded. On the contrary we hold that the Subordinate Judge's order at pages 11 and 12 of the record passed upon the application for amendment was a perfectly proper order. The only fault we have to find with the Subordinate Judge's procedure is that in spite of this order he allowed the whole of paragraph 8A to be added to the plaint. This was probably the result of inadvertence. At any rate, this paragraph 8A has no business to be in the plaint and must be expunged from the pleadings to the extent the amendment was disallowed.

In the next place, we have to observe that the allegations of negligence which constitute the cause of action are directed against the defendants second party consisting of three persons, Pandit Ajudhia Prasad, Pandit Bansidhar and Kishan Swarup. We have no concern in this case with any negligence or alleged negligence on the part of Ajudhia Prasad or Kishan Swarup. They owed no duty whatever to the present plaintiffs in connection with the previous suit. The only person whose negligence can be pleaded in this suit is Bansidhar who was the guardian *ad litem* of two of the plaintiffs who were impleaded in Suit No. 185 of 1917 as minor defendants (we have explained that the third plaintiff in the present suit was not born at the time when the earlier suit was brought). And so it follows that what has to be investigated in this suit is the negligence, if any, of Bansidhar.

Coming now to the law which has to be applied, we have no doubt that it is well settled that in certain circumstances a minor can claim to avoid a decree

passed against him in a suit in which he was represented by a guardian *ad litem*. The general rule on this subject derived from the authorities is thus stated in Halsbury's Laws of England, Vol. 17, page 138, paragraph 316:—

1925.
BRI RA
v.
RAM
SARUP.

"An infant plaintiff is as much bound as an adult by a judgment or order in the cause even though there may have been irregularities in the conduct of it, unless there has been fraud or gross negligence on the part of his next friend."

For a statement of the law as applied in India we may refer to the case of *Lalla Sheo Churn Lal v. Ramnandan Dobey* (1). In that judgement various authorities are cited. A reference is made to Macpherson on Infants, page 386, which reads as follows:—

"An infant plaintiff, though thus favoured in the course of the suit, is as much bound by a decree and by all the proceedings in a cause as a person of full age and cannot, nor can his representatives, open the proceedings unless upon new matter or on the ground of gross laches or of fraud and collusion which will annul the proceedings of the courts of justice as much as any other transactions."

Reference is also made to Simpson on the Law of Infants, 1st Edition, page 475 (1). In this the law is stated as follows:—

"A decree may also be impeached where there has been gross negligence by the next friend in the conduct of the infant's case or new matter discovered since the date of the decree."

The judgment also refers to the case of *In re Houghton* (2). That was a case in which the court found that the next friend of the minor had "grossly and inexcusably" neglected his duty; and so it was held that the infant had a remedy and might on the ground of the neglect of duty by the next friend reopen the proceedings.

(1) (1894) I.L.R., 22 Cal., 8. (2) (1874) L.R., 18 Eq., 578(576).

1925.

BRIJ RAJ
v.
RAM
SARUP.

After referring to these English authorities the court observed that the same rule of law would be applied in India, namely, that the gross negligence of his next friend would entitle a minor to the avoidance of proceedings undertaken on his behalf, and by parity of reasoning the same rule would apply in the case of a minor defendant who had been represented in litigation by a guardian *ad litem*.

The law was laid down in the same sense in *Ram Sarup Lal v. Shah Latafat Hossein* (1), where *Gregory v. Molesworth* (2) was cited to show that an infant has a remedy either by application for review of judgment or by separate suit when either gross laches or fraud or a collusion is found in the next friend. The result appears to be that the negligence or laches of the guardian which entitled the minor to avoid the decree must be of a gross character. The word "gross" is used in all the cases to which we have referred. It has been argued before us and on very good authority that the expression "gross negligence" has no definite meaning and reference has been made to the dictum of ROLFE, B. in *Wilson v. Brett* (3), that he could see no difference between "negligence" and "gross negligence" but that it was the same thing with the addition of a vituperative epithet.

Then there is authority of LORD DENMAN in *Hinton v. Dibbin* (4), who says:—

"It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists".

The truth is that no real definition of negligence can be laid down without a conception of the measure.

(1) (1902) I.L.R., 29 Calc., 735.

(2) (1747) 3 Atk., 626.

(3) (1843) 11 M.&W., 113 (115).

(4) (1842) 2 Q.B.R., 646 (661).

of the duty prescribed in the circumstances of the particular case under consideration.

1925.

BRIJ RAI

v.
RAM
SABUP.

Negligence is the breach of a legal duty to take care and until we know what the duty is in the particular instance we are unable to predicate whether there has been negligence or not. The standard of due care in all cases in which a duty to take care exists is the care which would be taken in the same circumstances by an ordinary careful man. The test is the conduct of the average man in like circumstances and with like knowledge and means of knowledge, and obviously the amount of care will be different in different cases, for, as observed by a learned author (Salmond in his Law of Torts),

“a reasonable man will not show the same anxious care when handling an umbrella as when handling a loaded gun”.

The case we are dealing with here is that of a person appointed as guardian *ad litem* to look after the interests of an infant defendant and the standard of duty is in this case that which would be followed by the man of ordinary prudence if he were called upon to act in like circumstances on behalf of himself and his own property. He must do as much to protect the interests of the minor as he would do to protect his own.

No more precise definition of the duty of a guardian *ad litem* can be safely laid down. It is to be observed that it is not every act or omission of a guardian *ad litem* which may seem at first sight to constitute a falling away from this standard of duty which can be seized upon for the purpose of founding a case upon negligence. As was pointed out in the case of *Baboo Lekhraj Roy v. Baboo Mahtab Chand* (1), while it is undoubtedly the duty of guardians scrupulously to regard the interests of minors in

(1) (1871) 14 Moo. I.A., 393 (399).

1925. dealing with their estates, the interests of infants
BRIJ RAJ would seriously suffer if a notion were to prevail that
RAM SARUP. guardians were bound for their own security to contest
all claims against an infant's estate whether well or
ill-founded.

The implication of this is that there is no universal duty cast upon a guardian *ad litem* to defend a suit brought against a minor even if the suit be well founded. It may, in the particular circumstances of the case, be expedient in the interests of the minor to refrain from making any defence.

And following this authority it was held in the case of *Parmeswari Pershad v. Sheo Dutt Rai* (1), that it is not every kind of negligence nor any amount of negligence which would render proceedings otherwise regular and proper liable to be opened. It must be such negligence as leads to the loss of a right which, if the suit had been conducted or resisted with due care, must have been successfully asserted. It is not sufficient to show that the guardian *ad litem* absented himself; it must also be proved that there was an available good ground of defence which was not put forward owing to the default of the guardian *ad litem* to appear at the trial. Or, to put the matter differently, the nature of the duty demanded from the guardian *ad litem* may vary according to the nature of the case in which he is called upon to act. An omission to defend or to raise a particular plea or to call certain evidence might in the circumstances of a particular case amount to negligence or to a breach of the duty which was owing by the guardian *ad litem* to the infant in that case. In different circumstances such an omission might not amount to negligence. The thing to be regarded in each circumstance is the interest of the minor.

(1) (1907) 6 C.L.J., 448.

In short the test which the cases seem to lay down is whether or not there has been a culpable neglect of the interests of the minor. Has there been in the conduct of the suit any act or omission on the part of the guardian *ad litem* which in the result has wrought prejudice to the minor's interests? That appears to be what is meant by the expression gross negligence or laches when used in this context.

1925.
BRIJ RAJ
v.
RAM
SARUP.

In the case with which we are dealing we are concerned with what was done or not done by Bansidhar alone. He was the person responsible for the protection of the interests of his two minor sons who, like himself, were impleaded as defendants. Incidentally it may be observed that Bansidhar was not engaged merely in looking after the interests of the minors alone; his own interests in the same property were at stake and were capable of protection in the same way.

The matter then to be decided is whether with reference to the allegations contained in paragraphs 4 and 5 of the plaint as they stand and to those contained in paragraphs 6, 7 and 8 as now amended, Bansidhar was guilty of negligence in the sense laid down above. We think this question must be inquired into and an opportunity given to the plaintiffs, which had not hitherto been given them, of showing, if they can, the negligence asserted. We, therefore, remit the following issues to the court below for findings:—

(1) With reference to the allegations contained in paragraphs 4 and 5 and the amended paragraphs 6, 7 and 8 of the plaint was Bansidhar as guardian *ad litem* in Suit No. 185 of 1917 guilty of negligence in the conduct of the suit on behalf of his minor sons?

1925.

BALI RAJ
v.
RAM
SARUP.

(2) If so, has that negligence resulted in pre-judice to the rights of the minors?

Both sides will be allowed to produce evidence on these issues and the findings will be returned to this Court within three months from this date. On receipt of the findings the usual period of ten days will be allowed for objections.

Issues remitted.

1925.
June, 8.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Mukerji.

MUHAMMAD SHAFIQ-ULLAH KHAN (PLAINTIFF) v.
NUH-ULLAH KHAN AND OTHERS (DEFENDANTS).*

Muhammadian law—Marriage—Legitimacy—Presumption—Acknowledgment—Evidence of the impossibility of a valid marriage between the alleged parents.

According to Muhammadian law, it is only where direct proof of marriage is not available that indirect proof of marriage by way of acknowledgment of legitimacy in favour of a son is allowed to take the place of direct proof of marriage. Where direct proof is available to establish that marriage was impossible or a marriage would be invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise. *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (1), *Muhammad Allahadad Khan v. Muhammad Ismail Khan* (2), referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgement of one Judge of a division bench.

Babu *Piari Lal Banerji* (with him Mr. M. U. S. Jang), for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

MEARS, C. J., and MUKERJI, J.—This appeal comes before this Bench on account of a difference of opinion between two learned Judges of this Court who heard the appeal in the first instance from the

* Appeal No. 97 of 1924, under section 10 of the Letters Patent.

(1) (1921) I.L.R., 48 Cal., 856.

(2) (1888) I.L.R., 10 All., 29.

court of a Subordinate Judge. The two learned Judges having differed, this appeal was filed under section 10 of the Letters Patent.

The only point for determination in this appeal is whether the defendants respondents are the legitimate sons of one Inayat-ullah Khan.

[The Court then discussed the evidence and continued :—]

Taking the whole evidence on the record, therefore, we are more than satisfied that the plaintiff's case is a true one, namely, Inayat-ullah kept a Hindu married woman as his mistress, and the defendants are the children of Inayat-ullah by that woman.

In the teeth of the above finding no rule of presumption of legitimacy or marriage can avail the defendants. The state of the law has been very clearly set forth in the judgment of this Court delivered by the learned Judge who was for decreeing the appeal, and we do not propose to go over the same ground again. It would be sufficient to mention that it is only where direct proof of marriage is not available that indirect proof of marriage by way of acknowledgment of legitimacy in favour of a son is allowed to take the place of direct proof of marriage. Where direct proof is available to establish that marriage was impossible or a marriage would be invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise. See the Privy Council case of *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (1), also *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (2).

The result is that this appeal succeeds, and we set aside the decrees of this Court and that of the court of first instance and decree the plaintiff's claim for possession with costs throughout.

Appeal allowed.

(1) (1921) I.L.R., 48 Ca'c., 856.

(2) (1888) I.L.R., 10 All., 289.

1925.

MUHAMMAD
SHAFIQ-
ULLAH
KHAN
v.
NUB-ULLAH
KHAN.

REVISIONAL CRIMINAL.

1925.
June, 10.

Before Mr. Justice Sulaiman.

KANHAIYA LAL v. BHAGWAN DAS.*

*Criminal Procedure Code, sections 195 and 476—Forgery—
Document produced in court by a party—Complaint by
private person not admissible.*

When a document has once been produced or given in evidence in a court, it is not thereafter open to a private person to lodge a complaint that an offence has been committed in respect of it by a party to the case in which it was produced; but proceedings can only be taken in respect of such a document by the court in which it was produced or by some other court to which that court is subordinate. *Emperor v. Bhawani Das* (1), followed. *Mathura Kuar v. Durga Kuar* (2), distinguished. *Emperor v. Lalta Prasad* (3), *Noor Mahomad Cassum v. Kaikhosru Maneckjee* (4), *Teni Shah v. Bolahi Shah* (5) and *Abdul Gani v. Emperor* (6), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. J. M. Banerji and Babu Piari Lal Banerji, for the petitioner.

Munshi Shambhu Nath Seth, for the opposite party.

SULAIMAN, J.—This is a criminal reference by the Sessions Judge of Cawnpore recommending that a case under section 467 of the Indian Penal Code pending in the Court of a first class Magistrate at Cawnpore should be stayed till a civil suit is finally disposed of. On the last occasion when this case came up for hearing the learned advocate for the accused contended that not only the hearing should be adjourned but that the original proceedings should be quashed

* Criminal Reference No. 294 of 1925.

(1) (1916) I.L.R., 38 All., 169.

(2) (1904) 2 A.L.J., 747.

(3) (1912) I.L.R., 34 All., 654.

(4) (1902) 4 Bom. L.R., 28.

(5) (1909) 5 Indian Cases, 879.

(6) (1915) 30 Indian Cases, 441.

altogether. As the learned vakil who appears to oppose this reference had no notice of this objection, I allowed the case to be postponed in order that he might be prepared to argue the point raised.

1925.

KANHAIYA
LAL
v.
BHAGWAN
DAS.

The facts of the case are briefly as follows :—Kanhaiya Lal accused has set up a will, dated the 27th of March, 1922, said to have been executed by a lady, Musammatt Basanti, who died two days after. Some time after her death the will was presented for registration before the Sub-Registrar and after contest by the complainant, Bhagwan Das, it was finally registered, though the endorsement of the Sub-Registrar suggests that he had some doubt as to whether the contents of the will had been fully made known to the lady who was in a critical condition. There were a number of other court proceedings to which Bhagwan Das was not a party in which this will was mentioned though not actually produced by Kanhāiya Lal. I, however, ignore those proceedings altogether. On the 23rd of September, 1922, Kanhaiya Lal filed an application for obtaining a succession certificate and in the course of this proceeding he mentioned the existence of the will though he did not actually produce it. The succession certificate was granted to him on the ground that he was the nearest heir, and the order granting the succession certificate was affirmed on appeal by the High Court.

On the 4th of February, 1925, Kanhaiya Lal filed a complaint under section 404 of the Indian Penal Code before the City Magistrate of Cawnpore against Bhagwan Das in respect of certain articles said to have been taken possession of by him which belonged originally to the deceased lady and which according to the complainant had been bequeathed to him. In this case the disputed will was actually produced before the court and evidence was led to prove it.

1925.
KANHAIYA
LAL
v.
BHAGWAN
DAS.

After the complainant's evidence had been closed, a charge was framed against the accused, but before the case came up for final hearing the complainant Kanhaiya Lal instituted a civil suit on the 3rd of March, 1925, on the strength of the will. He filed a certified copy of the will along with the plaint and stated that the original was on the criminal court's record and would be produced as soon as it was obtained from there. Later on, on the 18th of March, 1925, the complainant applied to the criminal court for leave to withdraw the complaint on the allegation that he had already filed a civil suit and the dispute would be considered by the court. The learned Magistrate, although the charge had been framed, instead of acquitting the accused in that case, discharged him. On the 21st of March, 1925, Bhagwan Das filed a complaint under section 476 of the Indian Penal Code against Kanhaiya Lal in respect of the disputed will, alleging that it was a forged document and that an offence described under section 463 had been committed.

It is this last criminal proceeding which has been recommended by the Sessions Judge to be stayed pending the disposal of the civil suit.

The question which I have to consider first is as to whether the proceeding started by Bhagwan Das on a private complaint made by him in respect of this disputed will, which had previously been produced before the City Magistrate, is competent.

There was certainly some conflict of opinion on this point when the old Code was in force. A view had been expressed by Knox, J., in the case of *Emperor v. Lalta Prasad* (1), that if an offence had been committed independently of and antecedent to any proceeding in a court, no sanction of that court was necessary. The Bombay High Court in the case

(1) (1912) I.L.R., 34 All., 654.

of *Noor Mahomad Cassum v. Kaikhosru Maneckjee* (1), took the same view and held that sanction was not necessary. The point, however, was referred by a learned Judge of this Court for decision to a Bench, *vide* the case of *Emperor v. Bhawani Das* (2). The learned Judges who formed that Bench came to the conclusion that no matter whether an offence had been committed prior to the court proceeding, if the disputed document was produced in that court, then after its production no criminal case could be started without the sanction of the court in which it was produced. PRAGOTT, J., at pages 173—4, rejected the contention that an offence could not with propriety be said to have been committed by a party to a proceeding on a date anterior to the institution of such proceeding, because he considered that the expression "offence committed by a party" in the old section was loosely used for the expression "offence alleged to have been committed by a party". The Calcutta High Court, in the case of *Teni Shah v. Bolahi Shah* (3), had taken the same view and this case was partly followed by a Bench of the same High Court in a later case, *Abdul Gani v. Emperor* (4), though the learned Judges thought that even if proceedings founded on an offence under section 467 could not proceed without the previous sanction of the civil court where the document was filed, the Magistrate was empowered to take cognizance of an offence under section 471. It is not easy to follow the distinction, as section 471 is expressly mentioned in section 195 (c). A similar view has also been taken by the Madras High Court in *re Parameswaran Nambudri* (5).

It seems to me, however, that these rulings are now a matter of academic discussion. The language

1925.

KANHAIYA
LAL
v.
BHAGWAN
DAS.

(1) (1902) 4 Bom. L.R., 268.

(2) (1916) I.L.R., 38 All., 169.

(3) (1909) 5 Indian Cases, 879.

(4) (1915) 30 Indian Cases, 411.

(5) (1915) I.L.R., 39 Mad., 677.

1925.

KANHAIYA
LAL
v.
BHAGWAN
DAS.

of section 195 has been slightly altered and it is significant that the expression suggested by PIGGOTT, J., in his judgment has actually been adopted by the legislature. I am entitled to draw the inference that the legislature has approved of the interpretation put on the old section by the Bench of this Court. Anyhow, as the section now stands there can be no doubt whatsoever that no court can take cognizance of an offence alleged to have been committed by a party to any proceeding in any court in respect of a document produced or given in evidence in such proceeding except on the complaint in writing of such court or of some other court to which such court is subordinate. The learned vakil for the complainant argues that Kanhaiya Lal, who was the complainant before the City Magistrate, cannot be said to be a party to that proceeding within the meaning of section 195 (c) inasmuch as the real party was the King-Emperor. It is impossible to accept this contention. The case was started on a private complaint filed by Kanhaiya Lal. It was he who was leading evidence and trying to establish the guilt of the then accused, and it was he who ultimately withdrew his complaint and on whose withdrawal the accused was discharged. There cannot be the slightest doubt that he was the prosecutor throughout that proceeding. I am, therefore, unable to hold that he cannot be deemed to have been a party to the proceeding before the City Magistrate. If Kanhaiya Lal was a party to the criminal court proceeding then there can be no doubt that the offence which is now alleged to have been committed by Kanhaiya Lal is alleged to have been committed by a person who was a party to the criminal court proceeding before the City Magistrate in respect of this disputed will which was in fact produced and given in evidence in such proceeding. That being so, no court

can take cognizance of such an offence except on the complaint in writing of the court of the City Magistrate or of some other court to which such court is subordinate. Of course if the civil court, before whom this document is produced again, comes to the conclusion that it is a forgery, it would be competent to initiate criminal proceedings against the person responsible for it.

The learned vakil for the complainant argues that this interpretation of section 195 is not correct because it would conflict with the provisions of section 476. His contention is that section 476 is confined to cases where an offence has been committed in or in relation to any proceeding in that court and he argues that section 195 must be deemed to be co-extensive with that section. I am unable to accept this contention. The expression "committed in or in relation to any proceeding in that court" which occurs in section 476 and also occurs in section 195 (b) does not occur in 195 (c), where the words are "alleged to have been committed by a party to any proceeding in respect of a document produced or given in evidence in such proceeding." I am of opinion that there would be no conflict between the two sections whatsoever. Section 476 speaks of "civil, revenue or criminal court". It does not refer to any court other than such courts, whereas section 195 refers to courts in general. To my mind it is clear that the expression "court" in section 195 is of a wider scope than the expression "civil, revenue or criminal court" in section 476. This is made particularly clear by the amendment of section 195 (2) which was made by Act XVIII of 1923. It reads: "In clauses (b) and (c) of sub-section (1) the term "court" includes a "civil, revenue or criminal court". Obviously, therefore, the word "court" is of a wider meaning. It is, therefore, quite clear that

1925.

KANHAIYA
LAL
v.
BHAGWAN
DAS.

1925.

KANHAIYA
LAL
v.
BHAGWAN
DAS.

the legislature intends that if an offence has been committed in or in relation to any proceeding in any civil, revenue or criminal court, that court alone can start proceedings, but that if offences mentioned in sub-clause (b) are committed or if offences mentioned in sub-clause (c) are committed in respect of a document produced or given in evidence in such proceeding, then also no court shall take cognizance of them except on the complaint in writing by such court.

I am, therefore, of opinion that the proceedings started by Bhagwan Das in the court of the first class Magistrate of Cawnpore on a private complaint made by him are illegal and ought to be quashed, as was done in *Emperor v. Bhawani Das* (1).

Had I not come to the conclusion that these proceedings should be quashed, I would have had no hesitation in saying that these proceedings ought to be stayed pending the disposal of the civil case. Obviously it would be highly undesirable that the same dispute should be allowed to be fought out in two courts, namely, criminal and civil courts simultaneously. The case of *Mathura Kuar v. Durga Kuar* (2) is distinguishable, because there KNOX, J., was only considering the power of the original criminal court to adjourn the hearing of a criminal case before it. The inherent power of the High Court to stay proceedings is very wide and has been exercised in several cases by this Court.

I accordingly accept the reference and order that the proceeding pending before the first class Magistrate of Cawnpore in the case of Bhagwan Das v. Kanhaiya Lal and others under section 467 be quashed. This of course will not prevent a future

(1) (1916) I.L.R., 38 All., 169.

(2) (1904) 2 A.L.J., 747.

prosecution of the accused started by the City Magistrate or by the civil court in case it is found that the document is really a forgery.

Reference accepted.

1925.

KANHAIYA
LAL
v.
BHAGWAN
DAS.

APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Sulaiman.*

1925.
June, 12.

BISHNATH SINGH AND OTHERS (JUDGMENT-DEBTORS) v.
BASDEO SINGH (DECREE-HOLDER).*

Act (Local) No. II of 1903 (Bundelkhand Land Alienation Act), section 9, sub-clause (3)—Mortgage—Final decree for sale—Powers conferred by section 9 exercisable even after final decree.

Although it is advisable that original courts, when they find that a mortgage has been made which is ordinarily enforceable but which covers property situated within Bundelkhand which cannot be sold, should take action under section 9 (3) before passing the decree and not wait till the decree has been passed, the passing of a final decree for sale on a mortgage is not a bar to the exercise of powers under that section.

THIS was an appeal from the judgment of a single Judge of the Court under section 10 of the Letters Patent. The facts of the case sufficiently appear from the judgment under appeal, which was as follows :—

In a suit filed on foot of a mortgage effected by the appellants on the 13th of May, 1909, a preliminary decree for sale was passed on the 17th of January, 1918, which was made absolute on the 20th of December, 1919. The parties are members of an agricultural tribe.

When the decree was put under execution, an objection was filed by the judgment-debtors under section 16 of the

* Appeal No. 132 of 1924, under section 10 of the Letters Patent.

1925.

BISHNATH
SINGH
v.
BASDEO
SINGH.

Bundelkhand Land Alienation Act (United Provinces Act II of 1903), saying that the mortgaged property could not be sold in execution of a decree. The court upheld that objection. The decree-holder then asked the court to take proceedings under section 9 of the said Act. That prayer was acceded to by the court of first instance and the order of that court was upheld by the lower appellate court.

The contention here is that no reference can be made under section 9, clause (3), of that Act after a decree has been made absolute. But that section contains no such limitation. All that it lays down is that if a suit is instituted in any civil court on a mortgage made after the commencement of this Act by a member of an agricultural tribe, the court shall, if it finds that the mortgage is enforceable, refer the case to the Collector with a view to the exercise of the power conferred by clauses (1) and (2) of section 9. This power can be exercised at any stage, i.e., either before a decree has been passed or made absolute, or after it has been so passed or made absolute, because under section 16 the decree in such a case cannot be enforced by the sale of the mortgaged property and must be left out of account, as if it had in effect never been passed. So long as the decree or mortgage subsists, the claim to recover the money or to enforce the mortgage also subsists; and a reference can be made to the Collector, who can refuse or alter the terms of the mortgage so as to bring it into accordance with the Act and make it conform to the limitations imposed thereby. The decision in *Hanuman Prasad Narain Singh v. Harakh Narain* (1), does not apply, because no reference under section 9 was there asked for. On the other hand the decision in *Sheopargash Singh v. Radha Mohan Singh* (2), decided on the 18th of July, 1922, supports the conclusion that the claim can be referred to the Collector, though it had nominally matured into a decree which has been since found to be unenforceable.

The appeal, therefore, fails and is dismissed with costs.

On this appeal—

Munshi *Baleshwari Prasad*, for the appellants.

Mr. *S. Abu Ali*, for the respondent.

(1) (1919) I.L.R., 42 All., 142.

(2) S.A. No. 1457 of 1920, decided July 18, 1922.

MEARS, C. J., and SULAIMAN, J.:—This is a Letters Patent Appeal arising out of certain proceedings on the 13th of May, 1909. The judgment-debtors had executed a mortgage-deed of property situated in Bundelkhand in favour of the decree-holder. A preliminary decree for sale was obtained on the 17th of June, 1918, which was followed up by a final decree on the 20th of December, 1919, when an application for execution was filed and the decree-holder wanted to have the mortgaged property sold. An objection was raised by the judgment-debtors that the property being situated in Bundelkhand was not liable to be sold under section 16 of the Bundelkhand Land Alienation Act (United Provinces Act II of 1903). This objection was allowed, and the application was dismissed. After this, the decree-holder filed an application purporting to be an application under section 9, sub-clause (3) of the Act requesting the court to refer the case to the Collector with a view to the exercise of the power conferred upon him by sub-section 1 of section 9. The objection was raised on behalf of the judgment-debtor that the sub-section was not applicable after the final decree was passed. The objection was disallowed by both the courts below and also by a learned Judge of this Court.

Section 9, sub-clause (3), is not limited to a case where the point is raised before the decree is actually passed by the court. We, therefore, find it impossible to hold that the civil court ceased to have jurisdiction to act under that sub-section as soon as a nominal decree was passed which cannot in fact be executed by the sale of the property mortgaged. The position of the judgment-debtor and the decree-holder would be the same even if a decree has been passed which is incapable of execution. This view is supported by a decision of this Court in Execution Second Appeal

1925.

BISHNATH
SINGH
v.
BASDEO
SINGH.

1925.

BISHNATH
SINGH
v.
BASDEO
SINGH.

No. 1457 of 1920 decided on the 18th of July, 1922, where it was held that there was nothing in the wording of the section to support the contention that the provisions of section 9 have effect only before a decree is passed and not afterwards. The view taken by the learned Judge of this Court is in accordance with the previous decision, with which we agree.

We would, however, like to point out that it is advisable that original courts, when they find that a mortgage had been made which is ordinarily enforceable but which covers property situated within Bundelkhand which cannot be sold, should take action under section 9 (3) before passing the decree and not wait till the decree has been passed. We accordingly dismiss this appeal with costs.

Appeal dismissed.

1925.
June, 12.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Sulaiman.*

NAGESHAR RAI (DEFENDANT) v. NAND LAL AND OTHERS
(PLAINTIFFS).*

*Act No. IV of 1882 (Transfer of Property Act), section 63—
Mortgage—Suit for redemption—Accession—Grove
planted without consent of mortgagor.*

During the continuance of a mortgage and without the consent of the mortgagor the mortgagee planted a mango grove on part of the mortgaged property amounting to 1 bigha, 8 biswas, in area. The mortgagor sued for redemption, and it was found that there were on this area at the time of suit some 110 large trees over 30 years old.

Held that this grove was an accession not capable of separate possession or enjoyment, and as it was not made for the preservation of the principal property from destruction, forfeiture or sale, nor with the consent of the mortgagor, the

* Appeal No. 140 of 1924, under section 10 of the Letters Patent.

mortgagor was entitled to the benefit of it without paying compensation.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case sufficiently appear from the judgment under appeal, which was as follows:—

This appeal arises out of a suit for redemption. There were two mortgages, one the original usufructuary mortgage of the year 1884 and a subsequent deed of further charge, bearing interest, of the year 1909. The dispute in this appeal relates solely to certain fruit trees which the mortgagees have planted on the mortgaged property during the term of the mortgage, and the question at issue is whether the mortgagees are entitled either to remove these trees or to receive their value as compensation. The appellant Nageshar Rai is not one of the original mortgagees, but is the undivided brother of a purchaser of one half of the mortgagee rights at auction sale. It appears that the original mortgagees sub-mortgaged their rights and the sub-mortgage was enforced by sale.

The rights of parties are governed by section 63 of the Transfer of Property Act. Both the courts below have found as a fact that the trees are not proved to have been planted with the consent of the mortgagors. The appellant's learned counsel draws attention to the fact that the learned District Judge's finding is not expressed as clearly as it might be. The learned Judge says that it is extremely doubtful whether the grove was planted with the consent of the mortgagors. Reading this sentence with his subsequent finding that the oral evidence is not satisfactory, that the recitals in the deed seem to point to the conclusion that there was no consent and his final summing up of the position that the finding of the lower court on this point is not wrong, it is quite clear that the learned District Judge intended to find, as the trial court had already found, that the consent of the mortgagors was not established. The learned counsel has asked me to set aside this finding of fact on the ground of certain recitals in the deed of further charge. Those recitals are to the effect that trees had been planted by the mortgagors on the mortgaged

1925.

NAGESHAR
RAI
v.
NAND LAL.

1925.

NAGESHAR
RAI
v.
NAND LAL.

property, that the mortgagees were enjoying the usufruct of the trees in lieu of interest on the original usufructuary mortgage, that they should continue so to enjoy them, and that the interest on the deed of further charge should be separately paid. The intention was that the produce of these trees was not to be taken into account against the interest on the deed of further charge. This recital cannot possibly be treated as conclusively proving that the trees were originally planted with the mortgagors' consent. It amounts to nothing more than this that at the time of the execution of the latter deed the trees, whether originally planted with consent or without it, were in existence on the land. The parties wished to make it clear that the produce of these trees was not to affect the mortgagees' claim to the full amount of interest due to them on the deed of further charge. It is impossible to accept this recital as sufficient to do away with a finding of fact based on evidence which is binding on this Court in second appeal.

The case, therefore, falls under the latter portion of the second paragraph of section 63. Fruit trees are clearly not capable of separate possession apart from the land on which they stand. Where separate enjoyment is not possible, the rule laid down by the section is that the accession must be delivered with the property. The mortgagor is liable to pay compensation in two cases only, the first being that of an accession necessary for the preservation of the property and the second that of an accession made with the mortgagor's assent. The first of these conditions is clearly not applicable, and the second is negatived by the finding of fact of the court below. This view is supported by the remarks on page 85 of the judgment in *Zubeda Bibi v. Sheo Charan* (1), which has been cited in argument.

It has been further urged for the appellant that if separate possession of the fruit trees as such is not possible there is nothing to prevent the appellant cutting them down and enjoying the wood as timber. To this there are two answers. In the first place the cutting of the trees would be detrimental to the principal property within the meaning of the section and in the second place the enjoyment for which the appellant contends would not be enjoyment of the accession as it now exists, but of the trees in a mutilated condition and deprived of a large part of their value. I hold, therefore,

(1) (1899) I.L.R., 22 All., 83 (85).

for the reasons already given that the case is governed by the second sentence of the paragraph and that the decision of the courts below is correct. I accordingly dismiss the appeal with costs.

1925
NAGESHAR
RAI
v.
NAND LAL.

On appeal, MEARS, C. J., and SULAIMAN, J., upheld the judgement and dismissed the appeal.

Appeal dismissed.

REVISIONAL CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice,
and Mr. Justice Mukerji.*

1925
June, 17.

A. L. BROWNE (PETITIONER) v. H. A. PEARCE
(OPPOSITE-PARTY).*

Act No. VIII of 1911 (Indian Army Act), sections 2 and 120
—Civil Procedure Code, section 60 (j)—Execution of
decree—Attachment of pay—"Warrant officer"—
"Soldier"—Assistant surgeon.

Held that the pay of an Assistant Surgeon attached to a British Regiment serving in India is not liable to attachment in execution of a decree of a civil court.

THE facts of this case are fully stated in the judgement of the Court.

Mr. G. W. Dillon, for the applicant.

The opposite party was not represented.

MEARS, C. J. and MUKERJI, J. :—Madam Pearce, a milliner of Agra, sued Assistant Surgeon Browne, a member of the Indian Medical Department, for a sum of about Rs. 40. There are no particulars before us to show us the date or the actual amount, but at all events at the time when the judgement-creditor was seeking to recover the money by attachment, the sum was then Rs. 46-6-0.

* Civil Revision No. 47 of 1925.

1925

A. L.
BROWNE
v.
H. A.
PEARCE.

An application was made to the Small Cause Court Judge asking for the attachment of part of the pay of this Assistant Surgeon. That attachment issued, and when the papers arrived at headquarters the authorities there refused to recognize the order of the court, contending that the pay of the Assistant Surgeon was not attachable. Certain correspondence followed, and eventually the Government Pleader was instructed to lodge objections to the attachment of the judgement-debtor's pay. Those objections were dated the 21st of October, 1924, and seemed to treat the matter on the basis that this Assistant Surgeon was subject to the provisions of the Indian Army Act. On the argument the Small Cause Court seems to have been to some extent embarrassed by want of authorities and eventually the Judge decided to disallow the objection. Thereupon the matter has come up here in revision.

The point really is a very short one, and we may as well treat it under both the heads of the English authorities and the Indian, because Mr. *Dillon*, whilst putting forward the view that the Assistant Surgeon is in fact recruited under British conditions, agrees that it is possible he might have been recruited in India. In effect the position is precisely the same. An Assistant Surgeon is a Warrant Officer and is so described in Army Regulations, vol. 2, paragraph 132. Whatever his grade, be it 1st, 2nd, 3rd or 4th class, he is a Warrant Officer. Whether in the British or Indian Army he is alike a Warrant Officer. As regards the British Army he undoubtedly comes under the generic title of "soldier" as distinguished from "Officer", the latter word being used as applicable only to those who hold His Majesty's commission. A reference to the Army Act of 1881 (44 and 45 Victoria, Chapter 58), section 190 (clause 6), shows that "the

expression 'soldier' does not include an officer as defined by this Act but with the modifications in this Act contained in relation to the Warrant Officers, . . . does include a Warrant Officer not having an Honorary Commission". The Assistant Surgeon in this case is a Warrant Officer who does not hold an Honorary Commission. He, therefore, is in the Army Act designated as a "soldier" and subject to the legislation enacted for "soldiers". By section 136 of the same Act it is prescribed that "the pay of an officer or soldier of Her Majesty's Regular Forces shall be paid without any deduction other than the deductions authorized by this or any other Act or by any Royal Warrant for the time being". To that section must be added, in virtue of the provision of the Army Act (58 Victoria, Chap. 7) section 4, "or by any law passed by the Governor-General of India in Council".

1925
A. L.
BROWNE
v.
H. A.
PEARCE.

Therefore, so far as we have gone, it is perfectly clear that, unless there has been some law passed by the Governor-General of India in Council, the pay of a British soldier of His Majesty's Regular Forces serving in India cannot be the subject of attachment.

Attachment is dealt with in section 60 of the Code of Civil Procedure, and in the proviso to that section certain salaries of certain public officers or servants are attachable to a certain extent. Section 2 (clause 17) describes who are the public officers who fall under the description of persons whose salaries are attachable. Sub-head (c) of clause 17 is as follows:—"Every commissioned or gazetted officer in the military or naval forces of His Majesty . . . while serving under the Government". Now it is obvious that the clause does not include Assistant Surgeon Browne, because he is not a commissioned officer. But it has been suggested that the enactment known as the Civil Procedure Code was in fact a law

1925

A. L.
BROWNE
v.
H. A.
PEARCE.

passed by the Governor-General of India in Council, and if so, clause 17 (c) might be read as making the pay of commissioned officers in the military forces of His Majesty, serving in this country, liable to attachment. We understand, although it is not necessary for our decision, that a commissioned officer of His Majesty's forces serving in a British Regiment is not technically serving under the Government, and that is why the provision in the Code of Civil Procedure, section 60, is not applicable to him. We understand also, though it also is not necessary for our decision, that a British officer who passes into the service of an Indian Regiment, and thus is serving under the Indian Government, is liable to have his pay attached. We have thought fit to mention this because had we not said something of this character, it might have been assumed that Assistant Surgeon Browne escaped simply on the ground that he was not a commissioned officer, and that had he happened to have held an Honorary Commission, he would have been liable to have his pay attached.

Now on the assumption that he was an Assistant Surgeon recruited in India, we find the position to be the same. Section 120 of Act VIII of 1911 says that the pay and allowances of any person subject to this Act shall not be attached by direction of any civil or revenue court in satisfaction of any decree or order enforceable against him. Section 2 of the same Act mentions Warrant Officers specifically as persons subject to it. Under the provisions of this Act, therefore, Assistant Surgeon Browne is clearly included and his pay is not attachable even on the assumption that he was recruited in India. Further a reference to section 60 (j) of the Code of Civil Procedure shows that no attachment can issue as regards pay and allowances of persons:

to whom the Indian Articles of War, applied. Act V of 1869 was described as the Indian Articles of War—a description also continued in the amended Act XII of 1894. Both of the Acts have been repealed, and the present Act is Act No. VIII of 1911, to which we have just referred. That is styled the Indian Army Act. So that there is no doubt that the reference in the Civil Procedure Code, wherein the statutes are described as the Indian Articles of War, must now be regarded as referring to Act VIII of 1911.

In these circumstances we are of opinion that this revision must be allowed and that the salary of this Assistant Surgeon was not attachable.

The money which has been paid under protest by the Controller of Military Accounts, Meerut, must be refunded.

Revision allowed.

APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice,
and Mr. Justice Sulaiman.*

1925
June, 19.

TAJAMMUL HUSAIN (PLAINTIFF) *v.* BANWARI LAL
AND OTHERS (DEFENDANTS).*

*Landlord and tenant—Sale of houses in abadi—Custom—
Evidential value of sale deeds and transfers in favour of
strangers.*

Held that the existence of a large number of sale-deeds, extending over a period of some sixty years, whereby tenants owning houses in the *abadi* had transferred them to strangers, without any objection on the part of the zamindars, was evidence upon which the High Court, in second appeal, might find the existence of a custom established, although the lower courts had negatived its existence.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single judge.

* Appeal No. 29 of 1924, under section 10 of the Letters Patent.

1925

TAJAMMUL
HUSAIN
v.
BANWARI
LAL.

The facts of the case sufficiently appear from the judgement under appeal, which was as follows :—

These two appeals arise out of two suits brought by the co-sharers of the village Kawwal for the recovery of possession of certain houses by the removal of the materials standing thereon. The allegation of the plaintiffs was that the said houses were occupied by *ryots*, who had no power of transfer, and the sales effected by them in favour of other persons without the permission of the zamindars were invalid. The defence was that the village Kawwal was not an agricultural village and the residents of that village had a right to transfer houses belonging to them, including the right of occupancy, to any person they liked. They relied in support of that contention on various sales, which had taken place since 1862. The *wajib-ul-arz* of the village was also produced. In one of the cases the trial court came to the conclusion that the custom set up by the defendants was not established. In the other case, which was tried later by a different Judge, it was found that the said custom was established. Appeals from both these decisions were heard at different times by the same Subordinate Judge, and in each case the finding of the trial court was affirmed.

As pointed out in *Ram Bilas v. Lal Bahadur* (1), where a question arises as to the existence or non-existence of a particular custom, the question of the sufficiency of the evidence adduced to establish that custom is one of law; and it has to be determined in each case in the light of the evidence produced therein in support or failure of such a custom. The village Kawwal is described by the courts below as a large and important village containing a dispensary and a school. There is much trade in grain and cloth; and markets are held there twice a week. It is, according to the evidence, occupied by people of all castes and professions, and is by no means a purely agricultural village in any sense of the term. The learned Subordinate Judge points out in one of the cases that the witnesses for the plaintiffs admitted that the transfer of houses was a matter of daily occurrence, that the village was no longer a purely agricultural village, and that one of the witnesses, Manglu, estimated that the number of such transfers was about 200. He also refers to a judgement

(1) (1908) I.L.R., 30 All., 311.

of the 29th of July, 1865, in which the existence of the custom of transfer by *ryots* was recognized. The defendants filed 91 sale-deeds, covering a period of nearly 60 years, evidencing transfers made by *ryots* of the houses belonging to them. Some of those transfers are stated to have been made in favour of the zamindars themselves, but the remainder were made in favour of strangers or other residents of the village; and the right of the vendees to occupy the houses purchased by them was never challenged by the zamindars and they have remained in possession since. There is nothing to show that those transfers were made with the permission of the zamindars. On the other hand, the witnesses adduced stated that they had been made from time to time without the permission of the zamindars, in pursuance of the custom which authorized such transfers. In fact one of the zamindars, Joti Prasad, who was examined on behalf of the defendants, stated that there was a custom to that effect in the village.

1925.

TAJAMMUL
HUSAIN
v.
BANWARI
LAL.

On behalf of the plaintiffs the *wajib-ul-arz* of 1872, and three decisions, two of which were based on compromises, have been referred to. The *wajib-ul-arz* states that the *ryots* had a right to mortgage and sell the materials (malwa) of their houses, but that statement is only a negation of their right to mortgage or sell the land; and in common parlance it does not imply that the vendee or mortgagee would have no right to occupy the land or, in other words, to keep the house or its materials intact there. The materials therein referred to manifestly mean the standing materials with the right of occupancy attaching to them and not the dismantled materials which would be of little value to the mortgagee or vendee, particularly in the case of kachcha houses, after their removal. It does not mention that the mortgagee or vendee would have removed the materials after the mortgage or sale by the demolition of the house; and the construction sought to be put on it, namely, that the mortgagee or purchaser cannot keep the materials standing and enjoy the benefit of the houses they constitute, is unreasonable and cannot be sustained. If the intention had been that the mortgagee or vendee in such a case should remove the materials, some such terms would obviously have been used to indicate it.

In any case, even if the *wajib-ul-arz* be treated as ambiguous, there is sufficient evidence, to which the lower court

1925
 TAJAMMUL
 HUSAIN
 v.
 BANWARI
 LAL.

has referred, to establish that the right of the *ryots* to transfer their houses in this village has been recognized, and that transfers have taken place during the last 60 years under which the transferees have remained in possession. It is contended on behalf of the plaintiffs, that it is possible that these transfers may have been made with the consent of the zamindars or under some special agreement with the tenants made at the time when the occupancy of the houses began. But if there were any such circumstances attending those transfers, they should have been brought out in the evidence. In the absence of any proof of such circumstances, the transfers must *prima facie* be taken to prove that a custom of the kind set up was recognized in the village.

The decision in *Ram Bilas v. Lal Bahadur* (1) and *Mohammad Vilayat Ali Khan v. Mohammad Liyaqat Ali Khan* (2) have been cited to show that such transfers are by themselves not sufficient evidence of the existence of the custom. But where a question of fact is at issue, each case must be decided on its own merits, and the finding arrived at on the evidence adduced in one case cannot be used to guide the decision of a kindred issue in another case, not heard with it. As a general rule the more frequent the transfers and the greater the period covered by them, the stronger the inference, resting indirectly on the conduct of the zamindar, in favour of such a custom. In *Girraj Singh v. Hargobind Sahai* (3) where a great number of documents, both sale deeds and mortgages, were produced besides certain decrees in which the existence of the custom was recognized, it was held that in the face of those documents the decision of the courts below that the custom set up did prevail could not be regarded as based on insufficient or illegal evidence. In *Faiyaz Ali v. Rekhab Das* (4), where in support of such an alleged custom, by which the tenants in a village could transfer their houses, several sale-deeds and certificates evidencing such transfers were produced besides other evidence, it was held that it was for the zamindars to explain them away and to show under what circumstances those transfers were made and that they were such as could in no way prove the custom. It is true that in the latter case the *wajib-ul-arz* was not produced; but a judgment was produced in which the existence of the custom had been

(1) (1908) I.L.R., 30 All., 311.

(2) (1910) 6 Indian Cases, 580.

(3) (1909) I.L.R., 32 All., 125 (128).

(4) (1920) 19 A.L.J., 104.

recognized. But in this case the *wajib-ul-arz* does not necessarily negative the existence of such a right or custom; and instances of transfers to which no exception was taken during the last sixty years afford corroborative evidence of the existence of such a custom. Indeed it is hardly likely that had no such custom existed or that the *wajib-ul-arz* meant that the mortgagee or vendee should remove the materials as soon as the mortgage or sale was effected, the zamindars would not have taken steps to challenge the transfers and got the transferees evicted from the houses so acquired. Customs usually grow out of instances and acquire force and sanctity as instances multiply. Such instances have been proved in these cases. While there is a decision of 1912 in which the existence of such a custom was negatived, there is another decision of 1865 in which the existence of such a custom was recognized. It cannot be said what evidence was forthcoming in either of those cases. The findings in the present suits must proceed on the evidence adduced in these cases, which, as has been pointed out, is sufficient to establish the existence of the custom which the defendants set up. Second Appeal No. 802 of 1922 must therefore be allowed.

1925

TAJAMMUL
HUSAIN
v.
BANWARI
LAL.

On an appeal being brought against the decision, under section 10 of the Letters Patent, it was held by the CHIEF JUSTICE and Mr. JUSTICE SULAIMAN that the evidence was sufficient in law to establish the custom, and that the decision was right.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice,
and Mr. Justice Sulaiman.

1925
June, 26.

DARSHAN DAS (PLAINTIFF) v. BIKRAMAJIT RAI
AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order XXII, rule 4 (3)—Appeal—Death of one of the defendants respondents—Abatement, whether in whole or in part.

Where there are several respondents to an appeal, and one of them dies during the pendency of the appeal and the appellant omits to bring his heir on the record within time,

* Appeal No. 144 of 1924, under section 10 of the Letters Patent.

1925

DARSHAN
DAS
v.
BIKRAMAJIT
RAI.

the question whether the appeal abates in whole or in part depends on whether the interests of the respondents are or are not separately defined. If they are separable, the appeal will abate only as regards the interest of the deceased respondent : if they are joint, the appeal will abate as regards the whole of the joint interest. *Sarat Kamini Dasi v. Chaitanya Chandra Prohoraj* (1), *Sheikh Dendoo v. Shaikh Sachoo* (2), *Wajid Ali Khan v. Puran Singh* (3), *Khuda Bakhsh v. Mathra Das* (4) and *Hadu v. Lala* (5), referred to.

This was an appeal under section 10 of the Letters Patent from the judgement of a single Judge. The facts of the case sufficiently appear from the judgement under appeal, which was as follows:—

This appeal arises out of a suit brought by mahant Darshan Das for possession of certain property on the ground that it belonged to the *math* of which he had been duly elected mahant. The property in suit had been sold by one Musammat Subhagi to Gobind Rai and 5 other persons. Musammat Subhagi's claim to the property was that it had been given to her by Sheoraj Das, a former mahant.

The trial court found that the property belongs to the *math* and should not have been transferred by Sheoraj Das, but holding that the plaintiff had failed to prove his own due election as mahant, dismissed his suit.

Darshan Das appealed and made Musammat Subhagi and all her transferees respondents. During the pendency of the appeal Gobind Rai died. No application was made to have his legal representatives made parties to the suit and no notice was taken of his death in the lower appellate court.

The learned Judge found that Darshan Das had proved his title and decreed his suit against all the respondents including Gobind Rai.

Only one point has been argued in this Court. That is that the whole appeal had abated as against all the respondents and the decree of the court below had become null and void.

Order XXII, rule 4 (3), provides that when no application is made to cause the representative of a deceased defendant to be made a party, the suit shall abate as against the

(1) (1922) 67 Indian Cases, 290.

(2) (1922) 72 Indian Cases, 2 (3).

(3) (1924) I.L.R., 47 All., 100.

(4) (1913) 62 Punj. Rec.

(5) (1915) 41 Punj. Rec.

deceased defendant, and rule 11 of the same order makes the order applicable to appeals.

The appellants' contention is that though the rule in question only provides that the appeal shall abate as against the deceased respondent, there are cases, such as the present one, in which it must abate as against all the respondents. The test is whether the result of leaving the decree to stand would be to have two inconsistent or contradictory decrees relating to the same subject-matter. Where the interests of the respondents can be distinguished and separated, then the appeal will abate as against the deceased respondent only, but where no such determination is possible, it must abate against them all. Several rulings of the Calcutta High Court have been cited in support of this proposition; in particular, *Sheikh Dendoo v. Shaikh Sachoo* (1), *Sarat Kamini Dasi v. Chaitanya Chandara Prohoraj* (2) and *Kali Dayal Bhattacharya v. Nagendra Nath Pakrashi* (3). In the present case, the sale-deed is a joint one in favour of six defendants. If the present appeal is not allowed, then there will be two decrees—both of them final—under one of which the right of Gobind Rai to any part of the property in suit has been denied while, in the other, it has been allowed. At the same time it will be impossible for any body to ascertain without a suit for partition over what part of the property this right extends.

In my opinion this view is the correct one and must prevail. It has been taken by the Lahore High Court in *Sardari Lal v. Ram Lal* (4), and the principle underlying it has been more than once affirmed by this Court in cases under section 368 of the former Code of Civil Procedure, e.g., *Hem Kunwar v. Amba Prasad* (5). In that Code the words "as against the deceased defendant" did not find a place, but the courts generally held that a distinction ought to be made between the case in which a suit or appeal could proceed in the absence of legal representatives and those in which it could not. It is clear that this is an instance of a case in which the absence of any representative of Gobind Rai makes it impossible that the lower appellate court's decree should be allowed to stand.

1925

DARSHAN
DAS
v.
BIKRAMAJEE
RAI.

(1) (1922) 72 Indian Cases, 2.

(2) (1922) 67 Indian Cases, 290.

(3) (1919) 30 C.L.J., 217.

(4) (1919) I.L.R., 1 Lahore, 225.

(5) (1900) I.L.R., 22 All., 430.

1925

DARSEAN
DAS
v.
BIKRAMAJIT
RAI.

The appeal is allowed, the decree of the court below is set aside and that of the court of first instance restored. The appellants will get their costs in both courts.

On this appeal—

Dr. *Surendra Nath Sen* and Mr. *B. Malik*, for the appellant.

Dr. *M. L. Agarwala*, for the respondents.

MEARS, C.J., and SULAIMAN, J.:—This is an appeal by the plaintiff under the Letters Patent arising out of a suit for recovery of possession by avoiding a deed of gift executed by the last mahant in 1919 in favour of one Musammat Subhagi. Musammat Subhagi transferred the property gifted to her under a sale-deed, dated the 15th of October, 1919, in favour of the defendants Nos. 2, 3, 5, 6 and the father of defendant No. 4. The court of first instance dismissed the suit on the ground that the plaintiff had failed to prove that he was the mahant, though it found that the property was trust property and the transfer was invalid. On appeal to the District Judge the suit was decreed.

It, however, appears that before the appeal came on for hearing before the District Judge, Gobind Rai, one of the defendants respondents, died leaving his son Ambica alive. No application for substitution was made, and in fact the attention of the appellate court was not drawn to the fact of his death at all. The appeal was allowed as against all the defendants respondents.

On second appeal to the High Court a learned Judge of this Court held that the whole appeal had abated against all the respondents inasmuch as the heir of Gobind Rai had not been brought on the record. He accordingly restored the decree of the court of first instance.

We may point out that the counsel for the parties apparently did not bring to the notice of the learned Judge the fact that under the sale-deed, dated the 15th of October, 1919, there was a clear specification of the shares of some of the defendants. Bikramajit and Gobind Rai got half the share between them while Gokul Rai and Jamna Rai got one-fourth and Kedar Nath and Ram Dat Rai got the remaining one-fourth. When there was such a clear specification of the shares it is obvious that the appeal could not abate with regard to the interest of the last four persons mentioned, for no one who was jointly interested with them in the shares purchased by them had died. Under Order XXII, rule 4 (3) the suit abates as against the deceased defendant respondent only. Had this matter been brought to the notice of the learned Judge, we have no doubt that he would not have held that the whole appeal abated.

The question remains as to whether the omission to bring the heir of Gobind Rai on the record would make the appeal abate only with regard to the interest of Gobind Rai, whatever interest that may be, or whether it would abate with regard to the entire half share which was purchased by the two jointly.

If it could have been shown that Bikramajit and Gobind Rai formed a joint Hindu family and that on the death of Gobind Rai Bikramajit succeeded as the manager of the family, then the appeal might not even have abated with regard to this half share. This, however, is not shown. On the other hand, the fact that the other vendees who formed the other branches of the family had distinct and separate interests suggests that there has been a disintegration in the family. In the absence of any evidence to show that Bikramajit and Gobind Rai re-united after the separation of the other members, we must assume

1925

DARSHAN
DAS
v.
BIKRAMAJIT
RAI.

1925

DARSHAN
DASv.
BIKRAMAJIT
RAI.

that they were separate in status and that there was no right of survivorship *inter se*.

It cannot, however, be denied that under the sale-deed the two brothers jointly acquired a half share in the property. There was no specification as to the extent of their shares nor was there any recital as to the proportion in which they had contributed towards the sale consideration. In the absence of any such specification it must be assumed that each had a joint interest in the entire half which was allotted to the two. Thus Gobind Rai's son, Ambica Rai, being a joint owner of the half share, has a right to contest the plaintiff's claim by saying that there was a decree of the first court in favour of his deceased father and that the appellate court's decree is not binding on him. If Ambica Rai is entitled to put forward such a plea with regard to the entire half share in which he has a joint interest, the plaintiff cannot be allowed to have a decree against Bikramajit with respect to the same undivided half. Although the interests of the two may be distinct nevertheless they have a joint interest in the half share so long as the property remains undivided. The result of allowing the appeal against Bikramajit and at the same time leaving the decrees in favour of Gobind Rai intact would be to allow two contradictory decrees to remain with regard to the same property. This, in our opinion, should not be allowed.

There is ample authority in support of the view which we have taken. The case of *Sarat Kamini Dasi v. Chaitanya Chandara Prohoraj* (1) is a direct authority in point. At page 292 the learned Judges of the Calcutta High Court observed :

“ If the court comes to the conclusion that the defendants are in possession of specific plots of land in which the deceased

(1) (1922) 67 Indian Cases, 290.

defendant had no share, it will proceed to try the case as against such of the defendants, but if with respect to any plot of land the deceased defendant No. 20 *was jointly concerned, the suit must be dismissed with respect to such plot*."

The case of *Sheikh Dendoo v. Shaikh Sachoo* (1) was also a similar case where one of the defendants had died. It was there held that when his representatives were not brought on the record, the appeal abated in its entirety if the success of the appeal would result in two conflicting decisions with regard to the same subject-matter. In the case of *Wajid Ali Khan v. Puran Singh* (2) the learned Judge to whom the case had been referred remarked :

"When several persons have a joint interest in property it is in general impossible to give a joint decree for possession against some of them when the decree declaring the right of the other joint holders to retain possession has become final, otherwise the result would be two contradictory decrees, both of equal authority."

The Punjab Chief Court has adopted a similar view in the case of *Khuda Bakhsh v. Mathura Das* (3) and also in the case of *Hadu v. Lala* (4).

We accordingly hold that the appeal before the District Judge had abated in respect of the half share purchased by Bikramajit and Gobind Rai jointly, but that it had not abated with regard to the remaining two shares of a quarter each.

We accordingly allow this appeal and modifying the decree of the learned Judge of this Court decree the plaintiff's claim with regard to the two shares of a quarter each purchased by the defendants represented by Gokul Rai, Jamna Rai, Kedar Nath and Ram Dat Rai, but dismiss the suit with regard to the half share purchased by Bikramajit and Gobind Rai jointly.

1925

DARSHAN
DAS
v.
BIKRAMAJIT
RAI.

(1) (1922) 72 Indian Cases, 2.
(3) (1913) 62 Punj. Rec.

(2) (1924) I.L.R., 47 All., 100(112)
(4) (1915) 41 Punj. Rec.

1925

DARSHAN
DAS
v.
BIRRAMAJIT
RAI.

As the fact of the specification of shares was not brought to the notice of the learned Judge and the appeal has succeeded only partially, we direct that the parties should bear their own costs of the appeal in the High Court. As the plaintiff succeeded in the lower appellate court on the merits and the defendants withheld the information as to the death of the deceased from the court apparently to prevent the plaintiff from applying for substitution of names, we direct that the plaintiff should have his costs of both the courts below.

Appeal allowed.

[N.B.—LINDSAY, and KANHAIYA LAL, JJ., held to the same effect in *Shabbar Husain v. Abbas Ali and others* (F. A. 137 of 1922, decided on the 25th June, 1925) where a plaintiff claimed pre-emption against 8 vendees, unsuccessfully, and in appeal failed to bring on the record the representatives of a vendee-respondent who had meanwhile died.—ED.]

FULL BENCH.

1925
June, 29.
July, 6.

*Before Mr. Justice Lindsay, Mr. Justice Sulaiman and
Mr. Justice Daniels.*

FATEH SINGH AND OTHERS (DEFENDANTS) v. GOPAL NARAIN SINGH AND OTHERS (PLAINTIFFS) AND CHUNNI MISIR AND OTHERS (DEFENDANTS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 167—Declaratory suit filed in civil court with the object of affecting the decision of a revenue court—Course to be followed by civil court—Discretion of court.

Where a suit for a declaration of title is filed in a civil court with the object of affecting the decision of a court of revenue in a pending suit within the exclusive jurisdiction of that court, the course to be adopted by the civil court is to refuse the declaratory relief asked for by the plaintiff on the ground that such relief, if granted, would be nugatory.

Khiali Ram v. Nathu Lal (1), *Ganga Chamar v. Bindeshri Rai* (2), and *Mullo v. Ram Lal* (3), referred to.

* First Appeal No. 158 of 1924, from an order of K. G. Harper, District Judge of Benares, dated the 9th of July, 1924.

(1) (1893) I.L.R., 15 All., 219. (2) (1925) I.L.R., 47 All., 904.

(3) (1920) I.L.R., 43 All., 191.

THIS was an appeal referred to a Full Bench at the instance of a Bench consisting of SULAIMAN and DANIELS, JJ. The facts of the case are fully stated in the order of reference printed below.

Dr. *M. L. Agarwala*, for the appellants.

Munshi *Kamla Kant Varma*, for the respondents.

The following was the order of reference :—

SULAIMAN and DANIELS, JJ. :—The question for decision in this case is briefly this :—

While an ejectment suit is pending in the revenue court in which the main issue is whether the defendant is or is not a tenant of the plaintiff, will the civil court entertain a suit the object of which is to compel the revenue court to hold that the defendant is not a tenant?

The plaintiffs respondents, Gopal Narain Singh and Sri Narain Singh, are mortgagees from certain occupancy tenants under a mortgage executed in 1882.

The mortgage was a burdensome one as the interest exceeded the profits of the holding.

The tenants relinquished their holding in favour of the zamindars on the 23rd of March, 1923.

On 1st of October, 1923, the zamindars, B. Fateh Singh and others, brought a suit in the revenue court for the ejectment of the respondents, Gopal Narain and Sri Narain, as non-occupancy tenants. Their position was that as the occupancy tenants had relinquished the tenancy, the occupancy tenure had come to an end and the mortgagees were liable to ejectment either under section 34 of the Tenancy Act or as tenants-at-will. The mortgagees contested the suit, and while it was pending, they instituted on 17th of December, 1923, the present suit in the civil court against the zamindars for a declaration that the two deeds of relinquishment executed by the occupancy tenants are of no effect against them, and for an injunction restraining the zamindars from dispossessing them.

The Subordinate Judge, in whose court the suit was instituted, issued an injunction to the revenue courts to prevent their going on with the ejectment suit. It seems at least doubtful whether he was competent to do so, but this is a point we need not consider. On 16th of April, 1924, he dismissed the present suit as barred by section 167 of the Tenancy

1925

FATEH
SINGH
v.
GOPAL
NARAIN
SINGH.

1925

FATEH
SINGH
v.
GOPAL
NARAIN
SINGH.

Act. On 30th of June, 1924, the revenue court decreed the ejectment of the present plaintiffs, and on the morning of 9th of July, 1924, the zamindars, who are appellants before us, obtained actual possession. In the meantime the plaintiffs had appealed to the District Judge against the decision of the Subordinate Judge. On the very day on which the zamindars had got possession, namely, 9th of July, 1924, the District Judge allowed the appeal and remanded the suit for decision on the merits. Against that order the present appeal is preferred.

We are now informed by means of an affidavit that an appeal has been preferred to the Commissioner against the decision in the ejectment suit, and is still pending.

Two principles are clearly established by the decisions of this Court. The first is that a suit by a mortgagee of an occupancy holding for a declaration of the invalidity against him of a relinquishment executed by the occupancy tenant is entertainable by a civil court. This is settled by the Full Bench decision in *Brij Kumar Lal v. Sheo Kumar Misra* (1).

The second is that the civil court will not entertain a suit the object of which is to nullify a decree of the revenue court in a matter within the revenue court's exclusive jurisdiction. That is settled by the Full Bench decision in *Mullo v. Ram Lal* (2). The same principles have been followed in many subsequent cases, of which *Jagannath v. Balwant Singh* (3), and *Kundan Lal v. Parshadi* (4), are instances.

The difficulty arises in the intermediate case in which the civil suit is instituted while the suit in the revenue court is still pending. That the decisions are not uniform and that there is a need of a Full Bench decision to settle the question may be seen by reference to a few cases. Two cases almost exactly parallel to the present case, in which the civil court refused to entertain a suit of this nature on the ground that any decree the civil court might pass would be wholly nugatory, are *Ram Devi Kuari v. Bindesri Upadhya* (5), and *Shiva Prakash v. Karna* (6).

On the other hand, in *Jaigopal Narain Singh v. Uman Dat* (7), another case almost precisely parallel, the decision

(1) (1915) I.L.R., 37 All., 444.

(2) (1920) I.L.R., 43 All., 191.

(3) (1922) I.L.R., 44 All., 692.

(4) (1924) I.L.R., 46 All., 570.

(5) (1911) 8 A.L.J., 940.

(6) (1913) 11 A.L.J., 671.

(7) (1911) 8 A. L. J., 695.

was the other way, as the matter was still held to be *sub judice* in the revenue court because a revision was pending before the Board of Revenue. The Full Bench case *Brij Kumar Lal v. Sheo Kumar Misra* (1), did not touch this question in their judgement.

1925

FATEH
SINGH
v.
GOPAL
NARAIN
SINGH.

We direct the record to be laid before the CHIEF JUSTICE with a view to a reference to a Full Bench :

The case having been re-argued before the Full Bench, the following judgements were delivered :—

LINDSAY, J.—This case has been referred to a Full Bench. There is no need to set out the facts which are narrated in full in the referring order. The immediate matter for decision is set out at page 7 of the referring order as follows:—

“ What course is the civil court to adopt when a suit is filed before it the object of which is to effect the decision of the revenue court in a pending suit within the exclusive jurisdiction of that court ” ?

Without going into any discussion of the numerous cases which have been cited before us, it is perfectly plain that all the trouble which has arisen in matters of this kind is due to different interpretations of the act of surrender by an occupancy tenant who had made a mortgage of his occupancy holding.

Since the case reported in *Khiali Ram v. Nathu Lal* (2) was decided, it has been uniformly held in this Court that a mortgage of an occupancy holding made by an occupancy tenant prior to the enactment of the present Agra Tenancy Act, cannot be avoided by the occupancy tenant making a surrender of his occupancy rights to the zamindar.

On the other hand, the Board of Revenue have taken a different view and have held that such a

(1) (1915) I.L.R., 37 All., 444.

(2) (1893) I.L.R., 15 All., 219.

1925

FATEH
SINGH
v.
GOPAL
NARAIN
SINGH.

surrender operates to put an end to the relation of mortgagor and mortgagee. It is this conflict of decisions which results in the difficulties which are illustrated in the case which is now before us.

If the fact is that the Board of Revenue refuse to accept the view of the law which has been taken by this Court, it seems useless to insist that a civil court, which necessarily follows the law as laid down in this Court, must give a declaratory decree in favour of a mortgagee who comes to the civil court in order to obtain a declaration that the surrender made by his mortgagor is void and of no effect. When all is said and done, the granting of relief by way of declaration is a matter within the discretion of the civil court, and if it is made to appear that the declaration when granted to the plaintiff will be of no avail to him, that seems to me to be a very good reason for holding that in such a case the court should exercise its discretion against the plaintiff and decline to grant any relief. This is not to say that a suit for a declaration of the nature just mentioned is not entertainable by a civil court. That I think would be going too far. But it is clear that any civil court is entitled, in the exercise of its discretion, to refuse a declaration of this kind if it is to turn out to be purely nugatory. Here in the case before us, if the civil court decides that the mortgage is still subsisting and that a surrender made by the occupancy tenant to his landlord has not in any way affected the relation of mortgagor and mortgagee, all that can happen is that the mortgagee may go to the revenue court and seek to use the decree of the civil court as a weapon of defence. If the revenue court follows, as it is bound to follow, the decision of its own superior court, that weapon is of no avail whatever to him in the revenue court. I am of opinion, therefore, that the course which the

civil court ought to adopt in a case of this kind is to refuse the declaratory relief asked for by the plaintiff on the ground that such relief, if granted, would be nugatory. I would, therefore, answer the question which has been propounded in this sense.

1925

FATEH
SINGH
v.
GOPAL
NARAIN
SINGH.

SULAIMAN, J.—I concur in the proposed answer. Where it is clear to the civil court that its declaratory decree would be futile, the simple course would be to refuse to exercise its discretion for granting a declaratory relief. In fact I myself acted on that very ground in the case of *Ganga Chamar v. Bindeshri Rai* (1). In that case I declined to say that the civil suit was barred by section 167 of the Agra Tenancy Act or by any rule of limitation, but held that inasmuch as the revenue court was bound to proceed under section 199 (2) of the Act, the civil court had discretion to refuse the declaration. In cases where the revenue court has already decided the dispute the matter is concluded in view of the pronouncement of the Full Bench in the case of *Mullo v. Ram Lal* (2). Where, however, a case previously instituted in a revenue court is still pending there, I would think, that the more appropriate procedure would be to stay the civil suit till the matter is decided by the revenue court and then to accept its decision. This procedure will obviate the possibility of the revenue court litigation proving infructuous by reason of a dismissal for default, withdrawal or otherwise. In the present case, however, the matter has already been decided by the revenue court of first instance and this is, therefore, a fit case in which the declaration should be refused.

DANIELS, J.—I concur in the answer proposed and in the judgement of Mr. Justice LINDSAY.

(1) (1925) I.L.R., 47 All., 904.

(2) (1920) I.L.R., 43 All., 191.

1925

FATEH
SINGH
v.
GOPAL
NARAIN
SINGH.

[On receipt of the answer to the reference, the original Bench consisting of SULAIMAN and DANIELS, JJ., allowed this appeal and setting aside the order of the lower appellate court, restored the decree of the court of first instance with costs in all courts.]

Appeal allowed.

APPELLATE CIVIL.

1925
June, 30.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

AGHA HUSAIN AND OTHERS (APPLICANTS) v. QASIM ALI AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, section 47; order XXI, rule 92—Execution of decree—Sale confirmed—Subsequent amendment of decree no ground for setting it aside.

In the absence of fraud or collusion, a sale in execution which has once been confirmed cannot be set aside because the decree under which it was held was at first incorrectly drawn up and has since been amended. *Fatch Lal v. Sher Singh* (1), followed. *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2), and *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (3), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. S. A. Haidar, for the appellants.

Dr. Kailas Nath Katju and Maulvi Mukhtar Ahmad, for the respondents.

LINDSAY and SULAIMAN, JJ.:—These execution appeals arise out of an application which was made by certain judgement-debtors on the sole allegation that the decree was incorrectly prepared and had been subsequently amended, and the sale which took place in execution of the incorrect decree should be set aside.

* First Appeal No. 26 of 1924, from a decree of J. N. Mushran, Subordinate Judge of Meerut, dated the 24th of October, 1923.

(1) Civ. Rev. No. 40 of 1924, decided on 30th of July, 1924,

(2) (1892) I.L.R., 19 Calc., 683.

(3) (1887) I.L.R., 10 All., 166.

There was no allegation of any fraud or collusion nor was there any denial of the fact that the interests of third parties had come in. It was not expressly stated in the application under what provisions of law it had been made, but the learned advocate for the appellants has stated before us that it purports to have been made under section 47, Civil Procedure Code. The learned Judge of the court below has declined to grant this application inasmuch as the judgement-debtors were parties to the proceedings in which the sale was confirmed.

In our opinion when the sale has been confirmed, although it had taken place in execution of a decree which was incorrectly prepared, the sale cannot be set aside simply because the decree has been subsequently amended. On the date when the sale took place there was a decree binding on the parties. As it stood, the execution of it was perfectly legal. The mere fact that it has subsequently been amended or set aside in appeal would not make the sale a nullity. We may refer to the case of *Fateh Lal v. Sher Singh* (1) in support of this view.

The learned advocate for the appellants relies on the Privy Council case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). It has, however, to be noted that in that case the allegations of the party wishing to have the sale set aside were that the attachment and the sale had been brought about by fraud and collusion on the part of the judgement-creditors and the auction-purchasers, though the charge had been perfectly vague. Under the old Code sales could not be set aside on the ground of fraud under section 311 but only under section 244 of the Code of Civil Procedure. The remedy of the aggrieved party, as pointed out by their Lordships, was obviously under

1925

AGHA
HUSAIN
v.
QASIM ALI.

(1) Civ. Rev. No. 40 of 1924, decided on 30th of July, 1924.

(2) (1892) I.L.R., 19 Cal., 683.

1925

AGHA
HUSAIN
v.
QASIM ALI.

section 244, and therefore the mere fact that the purchaser, who was originally no party to the suit, was interested in the result did not matter. Under order XXI, rule 90, a sale can be set aside on the ground of irregularity as well as fraud. Obviously therefore, when a sale has been confirmed under rule 92, it no longer remains open to the judgement-debtor to challenge it under section 47. Furthermore, as we have said above, there is no allegation of any fraud at all in this case. Their Lordships of the Privy Council have in the case of *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (1) held that if a wrong decree is passed by the court of first instance and the sale takes place in execution of it and a third party purchases the property, that sale cannot be set aside merely on the ground that that decree is subsequently reversed on appeal.

As third parties have purchased the property, it is no longer a matter relating to execution of a decree exclusively between the original parties to the suit. The order confirming the sale cannot be challenged in this way.

If the application be treated as an application for review of the order confirming the sale then no appeal lies from the order refusing to grant it. In this view of the matter these appeals fail and they are dismissed with costs.

Appeal dismissed.

(1) (1887) I.L.R., 10 All., 166.

*Before Sir Grimwood Mears, Knight, Chief Justice, and Mr.
Justice Sulaiman.*

1925
June, 26.

MAKUNDI SINGH AND ANOTHER (DEFENDANTS) *v.*
PARBHU DAYAL AND ANOTHER (PLAINTIFFS).*

*Civil Procedure Code, order IX, rules 3, 8 and 9—Suit against
three defendants jointly—Dismissal for default—Distinc-
tion between cases of defendant who appeared and the
others who did not.*

Plaintiffs brought a suit for arrears of rent against three persons jointly. At the hearing the plaintiffs themselves did not appear and only one of the defendants appeared. The court dismissed the suit in its entirety. Plaintiffs attempted to get the dismissal set aside, and then, having failed in this brought a fresh suit against all three defendants.

Held that the position of the defendants was distinguishable. As regards the defendant who did appear the dismissal of the suit must be taken to have been made under order IX, rule 8, of the Code of Civil Procedure and therefore no second suit was maintainable as against him. As regards the other two defendants who did not appear, the dismissal of the suit must be taken to have been made under order IX, rule 3, and the suit would lie. And, inasmuch as the liability sought to be enforced was joint a decree might be passed against these two defendants for the whole of the rent due. *Bukharam v. Ramji* (1) and *Damu valad Diga v. Vakraya valad Nathu Kunbi* (2), referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of this case sufficiently appear from the judgement under appeal, which was as follows :—

This appeal arises out of a suit for arrears of rent for 1326 to 1328F. A previous suit was brought for arrears of rent for the same period against the present defendants. One of the defendants, Tirbhuwan Singh, attended on the date fixed for its hearing but he filed no defence and was not examined. The plaintiffs and the other defendants were absent. The suit was, therefore, dismissed for default.

* Appeal No. 146 of 1924, under section 10 of the Letters Patent.

(1) (1913) 23 Indian Cases, 878. (2) (1919) I.L.R., 44 Bom., 767.

1925

MAKUNDI
SINGH
v.
PAREHU
DAYAL.

The sole question for consideration in this case is whether the present suit is maintainable in respect of the same cause of action under order IX, rule 9, of the Code of Civil Procedure. The courts below have dismissed the claim, holding that the plaintiff was precluded from bringing a fresh suit in respect of the same cause of action, because one of the contesting defendants had attended when the suit was dismissed for default. Order IX, rule 3, lays down that where "neither" party appears when a suit is called on for hearing, the court may make an order that the suit be dismissed. But such a dismissal does not preclude the plaintiff from bringing a fresh suit for the same relief, subject to the law of limitation, against the same defendant. So far as the defendants Makundi Singh and Dip Narain Singh were concerned, it may well be said that neither party appeared when the suit was called on for hearing; and as against them the dismissal was one for default of both the parties. As regards Tirbhuwan Singh, the court ought to have either taken his defence or asked him whether he admitted the claim or denied it. The rent claimed was fixed in a previous proceeding between the parties under section 36 of the Agra Tenancy Act (United Provinces Act II of 1901). If Tirbhuwan Singh admitted his liability, it was open to the court under order IX, rule 8, of the Code of Civil Procedure to have decreed the claim as against him in accordance with that admission. If he denied it, the suit was liable to be dismissed against him for default with the consequence mentioned in order IX, rule 9, of the Code of Civil Procedure. The law contemplates a partial or a total dismissal of a suit for the default of the plaintiff under rule 8 and in either case it precludes the plaintiff from bringing a fresh suit in respect of the same cause of action. But as pointed out in *Bukharam v. Ramji* (1), a fresh suit in respect of the same cause of action against the defendants who were absent is not barred.

The rent claimed was due in respect of the joint tenancy and could have been recovered under section 43 of the Indian Contract Act (IX of 1872) from any one or more of the joint promisors. As laid down in *Muhammad Askari v. Radhe Ram Singh* (2), the effect of section 43 is to exclude the right of a joint contractor to claim to be sued along with his co-contractors; and a judgement, obtained against some only of

(1) (1913) 23 Indian Cases, 878. (2) (1900) I.L.R., 22 All., 307.

the joint contractors and remaining unsatisfied, is no bar to a second suit on the contract against the other joint contractors. In *Abdul Aziz v. Basdeo Singh* (1), it was similarly held that the liability of the joint holders of a fixed rate tenancy for the payment of rent was joint and several; and the failure of a plaintiff in a suit for rent against several fixed rate tenants jointly to bring upon the record the representatives of a deceased tenant was no bar to the continuance of the suit against the remaining defendants. In *Joy Gobind Laha v. Monmotha Nath Banerji* (2), and *Mool Chand v. Alwar Chetty* (3), a similar view was taken. In fact it was held in the latter case that a release by the decree-holder of some joint debtors from a liability under the decree did not operate as a release of the other judgement-debtors from their liability.

The plaintiff is, therefore, entitled to recover the whole rent from the remaining defendants, Makundi Singh and Dip Narain Singh, each of whom was jointly and severally liable for the whole arrears claimed as much as the defendant Tirbhuwan Singh, against whom the claim was somehow or other wholly dismissed for default. The appeal must, therefore, be allowed and the claim of the plaintiff will stand decreed with costs here and hitherto against the defendants Makundi Singh and Dip Narain Singh, who will bear their own costs throughout. The defendant Tirbhuwan Singh, against whom the claim stands dismissed, will get his separate costs, if any, from the plaintiff appellant in all the courts.

On this appeal—

Babu *Piari Lal Banerji*, for the appellants.

Pandit *Uma Shankar Bajpai*, for the respondents.

MEARS., C. J., and SULAIMAN, J.:—This is an appeal by the defendants, arising out of a suit for arrears of rent. On a previous occasion the plaintiffs had instituted a suit against the defendants to the present suit, namely, Tirbhuwan Singh and two others, on the same cause of action, for recovery of the same arrears of rent. On the day fixed for the

1925.

MAKUNDI
SINGH
v.
PARBHU
DAYAL.

(1) (1912) I.L.R., 34 All., 604. (2) (1906) I.L.R., 33 Calc., 580.
(3) (1915) I.L.R., 39 Mad., 548.

1925

MAKUNDI
SINGH
v.
PARBEU
DAYAL.

hearing of the previous suit Tirbhuwan Singh alone appeared before the court, but neither the plaintiffs nor the other two defendants were present. The court did not question Tirbhuwan Singh whether he admitted any part of the claim or not—nor did it take down his statement. It simply dismissed the suit for default.

The plaintiffs made an attempt to have the dismissal set aside and the suit restored, but their application was infructuous. They then brought the present suit on the same cause of action against the same defendants.

The courts below held that the present suit was barred by the provisions of order IX, rule 9, and the plaintiffs' only remedy was to have the previous dismissal set aside and not to institute a fresh suit.

A learned Judge of this Court on second appeal, however, came to the conclusion that, although the plaintiffs were not entitled to maintain a second suit against Tirbhuwan Singh, who had appeared on the former occasion, they were not debarred from maintaining a suit against the other defendants who also had been absent. He came to the conclusion that the dismissal should be deemed to have taken place under order IX, rule 3, so far as the other defendants were concerned and under order IX, rule 8, as far as Tirbhuwan Singh was concerned. He accordingly dismissed the suit against Tirbhuwan Singh, but decreed the claim against the other two defendants. Inasmuch as all the defendants were jointly and severally liable for the arrears of rent, the learned Judge passed a decree for the whole amount claimed against these other defendants.

The defendants have come up in appeal under the Letters Patent, and the learned advocate for them :

1925.

MAKUNDI
SINGH
v.
PARBHU
DAYAL.

has conceded that if the suit is maintainable against the defendants other than Tirbhuwan Singh, then there can be no doubt that they are liable for payment of the entire amount of the arrears. His main contention has been that the whole claim as against all the defendants was barred by the provisions of order IX; rule 9. His argument is twofold. In the first place, his contention is that, inasmuch as at least one of the defendants was present on the former occasion, it cannot be said that neither party appeared within the meaning of order IX, rule 3, and that, therefore, the previous dismissal could not have been under that rule. He further contends that that dismissal must be taken to have been under the first portion of rule 8, namely, where the defendant appeared and the plaintiff did not appear.

His second contention is that even if the suit was dismissed partly under rule 3, and partly under rule 8, the provisions of rule 9 still apply and the second suit is barred.

With regard to the second contention, we may say at once that it has clearly no force. If it be assumed that the previous dismissal was partly under rule 3 and partly under rule 8, then rule 9 can only apply to the dismissal so far as it was under rule 8 and not so far as it was under rule 3. The words in rule 9 are "where a suit is wholly or partly dismissed under rule 8." That expression obviously means a suit dismissed in part or in its entirety. It does not mean "where a suit is dismissed wholly or partly under rule 8 and partly under some other rule." This is the only grammatical meaning which can be given to the expression. The words "wholly or partly" modify the verb "is dismissed" and not the expression "under rule 8." The partial dismissal under rule 8 refers to the dismissal of the claim in part.

1925

MAKUNDI
SINGH
v.
PARBHU
DAYAL.

As to the first contention it must be conceded that if the language of rule 3 were to be considered alone, there would be much to be said in favour of the appellants' contention, for in common parlance the expression "neither party" would mean "not any one of two or more parties." This is the meaning assigned to the word "neither" in Murray's Dictionary. It would, therefore, look at first sight as if rule 3 would be applicable only if no one whose name appears on the record as a party is present in court. We, however, find that the words "the plaintiff", "the defendant" or "party" in the Code in various rules refers to the plaintiff, the defendant or the party whose case is being considered. For instance in order V, wherever the word "defendant" appears, it is obvious it means the particular defendant whose case is being considered. Similarly in order IX, rules 1 and 2, the word "defendant" would mean the defendant with whom we are concerned—and this would be the meaning attached to the word "defendant" in rule 6. Examining rule 8 in detail, we find that it consists of two portions. Under its first portion when the defendant appears and the plaintiff does not appear, the suit is to be dismissed. Clearly the word "defendant" does not necessarily mean all the defendants, it may mean any one of the defendants or it may mean the particular defendant with whose case we are concerned. Under the second portion of the same rule if a defendant appears and admits part of the claim, the suit is to be decreed against him in part and is to be dismissed so far as it relates to the remainder. There is no express provision in the second portion under which the suit is to be dismissed in its entirety. It follows that unless the word "defendant" is taken to mean the particular defendant with whose case we are concerned, there would be no ground for the dismissal

of the whole suit when one of the several defendants appears and admits a part of the claim. The language of the rules is certainly not very happy, but on the whole we have come to the conclusion that this is the best interpretation which could be put on the rules in this order.

1925.

MAKUNDI
SINGH
v.
PARBHET
DAYAL.

The result would be that the case of each defendant has to be considered separately. So far as the defendant who had appeared is concerned, the suit must be deemed to have been dismissed against him under rule 8; and the only remedy open to the plaintiffs as against him would be to have it set aside under rule 9: they cannot maintain a second suit. But so far as the other defendants, who never appeared in court, are concerned, the case is one where neither party appeared, namely, neither the plaintiffs nor those defendants. The provision of rule 3 would, therefore, apply as between these two sets of parties.

The learned Judge of this Court has referred to the case of *Bukharam v. Ramji* (1), decided by the officiating Judicial Commissioner of Nagpur, on facts which were very similar to the case before us. We may also refer to the case of *Damu valad Diga v. Vakrya valad Nathu Kunbi* (2), where CRUMP, J., remarked that it was difficult to follow the reasoning that for the purposes of rule 8 it is sufficient if one or some of several defendants appear. In his opinion it was necessary to take the case of each defendant on its own merits. In the case of several defendants the consequences of an order of dismissal need not necessarily be the same for all, the suit being dismissed against one set under rule 3 and against others under rule 8.

(1) (1913) 23 Indian Cases, 878. (2) (1919) I.L.R., 44 Bom., 767.

1925

MAKUNDI
SINGH
v.
PARBHU
DAYAL.

We accordingly uphold the decree of the learned Judge of this Court and dismiss the appeal with costs.

Appeal dismissed.

1925
June, 24.

Before Mr. Justice Sulaiman and Mr. Justice Boys.
KEHRI SINGH (PLAINTIFF) v. THIRPAL AND OTHERS
(DEFENDANTS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 167, 177 and 193—Civil Procedure Code, section 115—Order of remand by District Judge under section 177—Appeal—Revision—Jurisdiction of High Court.

No appeal lies to the High Court against an order of remand passed by a District Judge in an appeal from a Revenue Court under section 177 of the Agra Tenancy Act, 1901.

Gulzari Lal v. Latif Husain (1) and *Zohra v. Mangu Lal* (2), followed.

But the High Court has power to entertain a revision of an order made by a District Judge under section 177 of the Agra Tenancy Act, 1901, and is not precluded therefrom by section 167 of the Act.

Per Boys, J.—Section 167 of the Agra Tenancy Act, 1901, is concerned only with original proceedings.

Ahmadullah Khan v. Murli (3), *Kesho Das v. Murat Pandey* (4), *Lalta Prasad v. Kharga* (5), *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (6), *Gaj Kumar Chandar v. Salamat Ali* (7), *Muhammad Ehtisham Ali v. Lalji Singh* (8), *Damber Singh v. Sri Kishan Dass* (9), *Jamna Prasad v. Karan Singh* (10) and *Chuttan Lal v. Kanhaya Lal* (11), referred to.

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgements.

* First Appeal No. 173 of 1924, from an order of Ram Chandra Saksena, District Judge of Agra, dated the 16th of August, 1924.

(1) (1916) I.L.R., 38 All., 181.	(2) (1906) I.L.R., 28 All., 753.
(3) (1908) 5 A.L.J., 128.	(4) (1914) 12 A.L.J., 367.
(5) (1923) I.L.R., 45 All., 336.	(6) (1916) 14 A.L.J., 281.
(7) (1919) I.L.R., 42 All., 83.	(8) (1918) I.L.R., 41 All., 226.
(9) (1909) 6 A.L.J., 552.	(10) (1918) I.L.R., 41 All., 28.
(11) (1912) 10 A.L.J., 478.	

Pandit *Gopinath Kunzru* (for *Munshi Narain Prasad Ashthana*), for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondents.

1925

KERRI
SINGH
S.
THIRPAL.

SULAIMAN, J.—This is an appeal from an order of remand passed by the District Judge in an appeal from a revenue court. A preliminary objection has been taken that no appeal lies. This objection is well-founded. Under section 175 of the Agra Tenancy Act no appeal from any decree or order passed by any court under that Act lies except as therein provided. Under section 177 an appeal is provided from a decree of a District Judge passed on appeal but no appeal is provided from an order passed by a District Judge. It is, therefore, apparent that no appeal from his order of remand, which, of course, is not a decree, lies to this Court. This view is concluded by the decision of the Full Bench case of *Zohra v. Mangu Lal* (1), which has been followed recently in the case of *Gulzari Lal v. Latif Husain* (2).

The learned vakil for the appellant, however, contends that an appeal lies under paragraph 11 of the Letters Patent of this Court. In our opinion no such appeal lies under that paragraph at all. Under that paragraph this High Court is constituted a court of appeal from the civil courts and has power to exercise appellate jurisdiction *in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force*. The constitution of this High Court as a court of appeal is quite a different thing from saying that this Court has jurisdiction to hear appeals from every decree or order passed by a subordinate court. If, therefore, there is no law or regulation which allows an appeal to it,

(1) (1906) I.L.R., 28 All., 753. (2) (1916) I.L.R., 38 All., 181.

1925

KESHO
SINGH
v.
THIRPAL.

Sulaiman,

the High Court cannot assume an appellate jurisdiction. The power of revision and superintendence, however, is much wider.

The learned vakil for the appellant next urged that his appeal should be treated as a revision and that inasmuch as the learned District Judge has assumed jurisdiction which was not vested in him, this Court should interfere in revision. This argument is based on the assumption that no appeal lay to the District Judge because no question of proprietary title had been raised in the first court and no question of jurisdiction had been decided by it. The reply of the learned advocate for the respondent is that the High Court has no power of revision in a revenue matter at all. The question whether the High Court has power to interfere in revision has been considered in a number of cases which are by no means unanimous and so far there is no Full Bench decision on this matter. The position is as follows:—

In at least three cases, *Ahmad-ullah Khan v. Murli* (1), *Kesho Das v. Murat Pandey* (2) and *Lalta Prasad v. Kharga* (3), an application for revision was entertained. Then again in the case of *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (4), at least one Judge expressed the view that a revision may lie from an order passed by a Judge on appeal. On the other hand, the other learned Judge in the case last mentioned, as well as other learned Judges in the cases of *Gaj Kumar Chandar v. Salamat Ali* (5), and *Muhammad Ehtisham Ali v. Lalji Singh* (6), have expressly laid down that the High Court has no revisional jurisdiction in cases under the Tenancy Act.

If there were no direct authority in point I would have no hesitation in saying that there is no provision

(1) (1908) 5 A.L.J., 128.

(2) (1914) 12 A.L.J., 367.

(3) (1923) I.L.R., 45 All., 336.

(4) (1916) 14 A.L.J., 281.

(5) (1919) I.L.R., 42 All., 83.

(6) (1918) I.L.R., 41 All., 226.

in the Tenancy Act which bars the revisional jurisdiction of the High Court. In the first place, under section 193 of the Act the provisions of the Code of Civil Procedure, with the exception of certain provisions mentioned therein, are made applicable so far as they are not inconsistent with the Act. Section 115 of the Code of Civil Procedure, corresponding to the old section 622, is not excluded. *Primâ facie*, therefore, the revisional section of the Code of Civil Procedure is made applicable to suits and proceedings under the Tenancy Act unless there are other provisions of the Act which are repugnant to its application. In cases where it has been held that the High Court has no jurisdiction to interfere, reliance has been placed solely on the provisions of section 167 of the Act. Now section 167 bars suits and applications of the nature specified in the fourth schedule and it also prevents every court other than a revenue court from taking cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. It seems to us that the present application for revision would not be incompetent unless it be shown that a suit or application of the nature of this application could be brought or made in the revenue court as specified in the fourth schedule. Reference has been made to serial No. 51 in the fourth schedule where an application for revision under section 185 of the Act can be filed without any fixed period of limitation. But section 185 is expressly confined to revisions to the Board of Revenue from subordinate revenue courts. It does not refer to revisions from the court of the District Judge. It is, therefore, impossible to suggest that any application of this nature could have been brought or made in the revenue court. It would then follow that section 167 cannot be a bar to this application. If the argument be accepted that the High Court has no

1925

KEHNI
SINGH
v.
THIRPAL.

Sulaiman, J.

1925

KHEMI

SINGH

v.

THIRPAL.

Sulaiman, J.

revisional jurisdiction to interfere at all, then it was wholly futile to make section 115 of the Code of Civil Procedure applicable to the Act, for no case would then be conceivable where a revision would lie and section 167 would not be a bar. If the view urged on behalf of the appellant were not the correct view, then the result would be that an order passed by a District Judge without jurisdiction, and howsoever illegal it might be, would remain final and be not open to revision either by the Board of Revenue or by the High Court. We do not, however, consider it necessary to refer this case to a larger Bench because it is possible to dispose of the case on different grounds. In the written statement the defendant had taken several pleas including a denial of the relation of landlord and tenant and also a plea of want of jurisdiction of the civil court. The Assistant Collector only framed one issue as to whether the relation of landlord and tenant existed between the parties or not, and decided it by a summary judgement. The learned District Judge was of opinion that the suit had not been decided in a satisfactory manner, inasmuch as the first court did not even take the trouble to go into the question whether the tenant had really relinquished the holding or whether the alleged relinquishment was valid. He did not even come to a definite finding whether a surrender had been made, for before the mortgagee could be ejected, it was necessary to find that a surrender had actually taken place. In view of these defects the learned District Judge has set aside the decree and remanded the case for re-trial after taking such additional evidence as may be tendered by the parties. After all, the case will be retried after both parties have had full opportunity of producing their evidence. No real injustice has been done to the parties. It is not a fit case, even assuming that we have power to interfere in revision, in

which we ought to interfere. I would dismiss the appeal.

Boys, J.—I agree with the order proposed by my learned brother Mr. Justice SULAIMAN. The appeal is from an order of remand passed by a District Judge under section 177 of the Tenancy Act on appeal from a decree of an Assistant Collector of the first class.

It has hardly been contended that an appeal lies but we are asked to treat the matter as an application under section 115 on the revisional side. It is contended for the opposite party that no revision lies and the contention is certainly supported by judicial authority.

The relevant sections of the Tenancy Act are sections 167, 177, 185, 193 and 196.

We had to consider the following cases:—*Damber Singh v. Sri Kishan Dass* (1), *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (2), *Jamna Prasad v. Karan Singh* (3), *Muhammad Ehtisham Ali v. Lalji Singh* (4), and *Gaj Kumar Chander v. Salamat Ali* (5).

We were also referred to *Ahmad-ullah Khan v. Murli* (6), *Kesho Das v. Murat Pandey* (7) and *Lalta Prasad v. Kharga* (8), but though a revision was in fact entertained, the point whether a revision is competent was not raised in those cases.

In *Chuttan Lal v. Kanhaya Lal* (9), the point was raised but not decided. I shall not, therefore, further refer to these last four cases.

Of the first five cases that I have mentioned it will be convenient to give a brief account in order to judge exactly how far they are apposite to the facts of the present case and in order that it may be possible to form a correct estimate as to the steps by which the

1925

KEHRI
SINGH
v.
THIRPAL.

(1) (1910) 6 A.L.J., 552.

(3) (1918) I.L.R., 41 All., 28.

(5) (1919) I.L.R., 42 All., 83.

(7) (1914) 12 A.L.J., 367.

(2) (1916) 14 A.L.J., 281.

(4) (1918) I.L.R., 41 All., 226.

(6) (1908) 5 A.L.J., 128.

(8) (1923) I.L.R., 45 All., 386.

(9) (1912) 10 A.L.J., 478.

1925

KEHRI
SINGH
v.
THIRPAL.

Boys, J.

proposition may be said to have become nearly established that a revision does not lie.

In *Damber Singh v. Sri Kishan Dass* (1), RICHARDS and ALSTON, JJ., had before them an application in revision of an order of an Assistant Collector refusing execution. The suit had been filed in the court of an Assistant Collector of the first class and dismissed. The District Judge held that it should not have been tried in a revenue court, but under the provisions of sections 177, 196, 197 of the Tenancy Act entertained the appeal and decreed the suit. The decree-holder applied to the Assistant Collector in execution. The Assistant Collector refused the application, and the decree-holder applied to the High Court in revision. It was held that a revision was barred by section 167 of the Tenancy Act; and reliance was placed on the words "except in the way of appeal." In support of his right to apply in revision the applicant urged that the decree to be executed was in fact the decree of the District Judge. RICHARDS, J., remarked "possibly his remedy was to apply to the District Judge for execution of the decree." This suggests at least the possibility that an application in revision might have been considered competent if it had been framed as a revision from the order of a District Judge. The actual case dealt with the revision by the High Court of an order of an Assistant Collector, i.e., an order of a revenue court and can have no direct bearing on the case before us. The more general effect of some of the remarks I will consider later.

In *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (2), PIGGOTT and WALSH, JJ., had before them a revision of an order of a District Judge under section 180 of the Tenancy Act, dismissing a suit on second appeal from a Collector. PIGGOTT, J., after

(1) (1910) 6 A.L.J., 552.

(2) (1916) 14 A.L.J., 281.

holding that in any event the application did not come within the narrow compass of the provisions of section 115 of the Code of Civil Procedure, further held that the revision was wholly excluded by the last clause of section 167 of the Tenancy Act; that to entertain a revision would amount to "taking cognizance" of the dispute or matter in respect of which the suit was brought; and that the fact that section 115 of the Code of Civil Procedure is one of the sections made applicable by section 193 of the Tenancy Act to proceedings under the Tenancy Act did not affect the matter, as section 193 was expressly subject to and could not over-ride section 167. WALSH, J., differed, holding that "the decision of a District Judge given by way of an appeal from a revenue court is a decision of the civil court and is therefore subject to revision," and further that the hearing of the revision would not amount to "taking cognizance" of the dispute or matter in respect of which the suit was brought.

In *Jamna Prasad v. Karan Singh* (1), ABDUL RAOOF, J., had before him a case in which an appeal had been filed under section 177 before a District Judge from the decree of an Assistant Collector. The District Judge held that no appeal lay to his court from the decree of the Assistant Collector and returned the memorandum of appeal. ABDUL RAOOF, J., refused to distinguish the case of *Damber Singh v. Sri Kishan Dass* (2), and following the construction of section 167 in that case held that no revision was competent. I find myself unable to appreciate why the learned Judge found himself unable to distinguish the case of *Damber Singh v. Sri Kishan Dass* (2), which, as I have noted above, was a case where the court was asked to revise, not the order of a District Judge, a civil court, but of an Assistant Collector, a revenue court.

1925

KEERI
SINGH
v.
THIRPAL.

Boys, J.

(1) (1918) I.L.R., 41 All., 28.

(2) (1919) 6 A.L.J., 552.

1925

KEHRI
SINGH
v.
THIRPAL.

Boys, J.

In *Muhammad Ehtisham Ali v. Lalji Singh* (1), TUDBALL, J., had before him a revision of an order of an Assistant Collector of the first class. The matter had not gone before a District Judge. TUDBALL, J., relied on *Damber Singh v. Sri Kishan Dass* (2), referred to *Parbhu Narain Singh v. Harbans Lal* (3) and pointed out that WALSH, J., would apparently in the case of a revision of an order of an Assistant Collector have agreed that no revision was competent. TUDBALL, J., further relied on the words "of the nature" in section 167 and held that the nature of all revisions, whether civil, criminal or revenue, was alike. The learned Judge further remarked, and it is important to note this, that in the matter before him the case had not gone into the civil court at all because there had been no appeal whatever preferred to the District Judge, and there was therefore no order before him which could in any sense be deemed to be an order of a civil court. This again, as in the case of *Damber Singh v. Sri Kishan Dass* (2), suggests at least the possibility that the learned Judge would have decided otherwise if he had had before him the order of a District Judge. He held that there could be no revision of the order of the Assistant Collector. Here again the High Court was asked to revise the order of an Assistant Collector, a revenue court, and the decision can have no direct bearing on the case before us. The more general effect of some of the remarks I will consider later.

In *Gaj Kumar Chander v. Salamat Ali* (4), STUART and WALLACH, JJ., had before them a revision of an appellate order of a District Judge under section 180. After remarking that only revenue courts can deal with original matters, while appellate powers are sometimes vested in the revenue and sometimes in

(1) (1918) I.L.R., 41 All., 226.

(2) (1909) 6 A.L.J., 552.

(3) (1916) 14 A.L.J., 281.

(4) (1919) I.L.R., 42 All., 88.

the civil courts, the learned Judges held that by virtue of sections 167 and 193 "the only power that the High Court has to dispose of matters covered by Local Act II of 1901 is given by the Act itself; and the power of revision is not a power which is so given to it." They held that the fact that there is no exclusion of section 622 (now section 115) in section 193 of the Tenancy Act did not affect the question, for the provisions of the Code of Civil Procedure apply to the procedure in suits and other proceedings under the Rent Act so far as they are not inconsistent therewith. They held, therefore, that no revision lies.

It will be seen that the question whether an application in revision lies against an order of a District Judge under section 177 (the case before us) was only directly dealt with in *Jamna Prasad v. Karan Singh* (1), but the decisions in *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (2) and *Gaj Kumar Chander v. Salamat Ali* (3), which were cases where a District Judge acted under section 180, are also analogous. Section 177 is expressly referred to in the exception in section 185 while section 180 is not, but, whatever may be the reason for the omission, it does not seem to affect the present question, so I will regard the two later cases as also bearing on the case before us where the appeal was allowed by section 177.

In the main reliance was placed in these cases on a particular interpretation put on section 167; while any effect was denied to section 193 on the ground that any other interpretation would be in conflict with the interpretation already put on section 167.

I will first deal with these considerations.

In dealing with section 167 the words "of the nature" were relied on by TUDBALL, J., in *Muhammad Ehtisham Ali v. Lalji Singh* (4), as showing that

1925

KEHAI
SINGH
v.
THIRPAL.

Boys, J.

(1) (1918) I.L.R., 41 All., 28.
(3) (1919) I.L.R., 42 All., 83.

(2) (1916) 14 A.L.J., 281.
(4) (1918) I.L.R., 41 All., 226.

1925

KESHU
SINGH
v.

THURPAL.

Boys, J.

not only revisions by the Board under section 185 (Serial No. 51 of the fourth schedule) were excluded from the jurisdiction of revenue courts, but all revisions whether by civil, revenue or criminal courts. It may be that the words "of the nature" were used because there are some applications in the fourth schedule not further specified by sections (Serial Nos. 47, 48 and 49), or by way of precaution because there might be found to be analogous cases inclusion of which in the sole jurisdiction of revenue courts was desirable. But whatever be the reason for the words, I cannot believe that the legislature would have adopted such a vague method of including in the prohibition enacted by section 167 such a clearly defined class of proceedings as revisions. Nor was it necessary to hold this to support the particular decision. The fact that a power of revision was conferred on the Board by section 185 of the Tenancy Act was sufficient to exclude any power of the High Court under section 115 of the Code of Civil Procedure which otherwise might be held to exist in virtue of section 193 of the Tenancy Act.

Next, the words "*except in the way of appeal*" were relied on in *Damber Singh v. Sri Kishan Dass* (1) as showing that no revision lies. I will later state my view as to the real scope and intent of section 167 and of these words in particular as meant merely to make section 167 consistent with section 196; but, even if that view be wrong, the words in question could at most be intended to make section 167 consistent with sections 177, 180 and 196; such a form of words could not rightly be used or be interpreted to enact affirmatively anything in regard to revisional jurisdiction nor was it necessary to attribute this effect to the words in order to support the particular decision. It could

(1) (1909) 6 A.L.J., 552.

be supported for the same reason that I have already noted that the decision in *Muhammad Ehtisham Ali v. Lalji Singh* (1), could be supported.

1925

KEERI
SINGH
v.

THIRPAL.

Boys, J.

Further the words "*take cognizance*" were relied on in *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (2) by PIGGOTT, J., as excluding revision. WALSH, J., held the contrary. I shall state later, when giving my own view, the real scope, in my opinion, of these words.

In more than one case the force of the argument that while certain sections of the Code of Civil Procedure are by section 193 excluded, section 115 (the old section 622) is not excluded was repelled by holding that it was excluded as being inconsistent with section 167 of the Tenancy Act. The contention is of course sound, if in fact section 167 does really exclude revision under section 115 of the Code of Civil Procedure; but that only brings us back to the main question.

I have now considered earlier judicial authority and can find therein nothing that satisfies me that section 167 is any bar to this Court exercising revisional jurisdiction in respect of an order passed under section 177 of a District Judge who is undoubtedly a civil court. I would add that I am confirmed in my view by the absence of any reason for excluding the revisional jurisdiction of this Court in regard to a subordinate civil court, a District Judge, while allowing it to the Board, with one exception the reason for which is obvious, in regard to subordinate revenue courts.

I am further confirmed in my view by the fact that when the legislature considered in section 193

(1) (1918) I.L.R., 41 All., 226.

(2) (1916) 14 A.L.J., 281.

1925

KEHLI
SINGH
THIRPAL.

Boys, J.

with such meticulous care what provisions of the Code of Civil Procedure were to be excluded from importation by virtue of section 193 or were to be modified in their application, it should have left the exclusion of such an important provision as section 115 a matter of doubtful inference.

Further I note that apparently in both the decisions, *Damber Singh v. Sri Kishan Dass* (1) and *Muhammad Ehtisham Ali v. Lalji Singh* (2), there are remarks, to which I have referred above when summarizing those cases, which strongly suggest the possibility at least that they would have been decided differently if the revision had been against the order of a District Judge.

I have discussed what, in my opinion, section 167 does not enact, namely, that it does not affirmatively, even indirectly, prohibit revision of an order of a District Judge. I will now state my view of what section 167 does enact, the really limited scope and intent of the section.

It appears to me that the intention as expressed in section 167 is that the section is only concerned with the hearing of original suits and applications. This view of the section was not raised before us, but it appears at the least certainly not untenable and to be in accord with the scheme of the Act.

Before considering in detail the contents of the section, I would observe that there is nothing improbable in such a section being confined to original suits and other original proceedings. There is not the least need for any such section to contain any prohibition against appeals or revision from orders of revenue courts being heard by other than revenue courts (except as provided). It is wholly unnecessary to forbid a

(1) (1909) 6 A.L.J., 552.

(2) (1918) I.L.R., 41 All., 226.

civil court to hear a matter in appeal from a revenue court, for the jurisdiction of civil courts ordinarily to hear such appeals is already confined by the laws constituting such courts to appeals from subordinate civil courts, and they could not under any circumstance touch an appeal *from a revenue court*, except where such power was expressly given. Such power is, of course, given by sections 177, 180 and 196. But except where such power is expressly given, it would be entirely impossible to suggest that a civil court could have any appellate power at all and therefore any prohibition would be entirely superfluous. *Mutatis mutandis* exactly the same reasoning applies to revisions. No civil court could possibly entertain a revision of *an order of a revenue court* under the ordinary powers and laws constituting the civil courts. Therefore, there is no need to prohibit the exercise of such a revisional power. When we come, however, to original suits and proceedings the situation is wholly different and a prohibiting section is essential. But for such a section civil courts would have co-ordinate jurisdiction with revenue courts in very many matters. It is, therefore, necessary to prohibit the exercise of such jurisdiction by the civil courts, where it is desired to confine it to revenue courts. If I have made my meaning clear, we should then expect to find in the Act a section forbidding the exercise by civil courts of original jurisdiction in revenue matters and we should not expect to find such a section forbidding them to exercise appellate or revisional powers, as such prohibitions would be superfluous.

I have thought it convenient to consider first what might be expected before considering what we actually find, thus inverting the usual course; while, of course, recognizing that operative words must be interpreted in accordance with what has been actually said and

1925

KEERI
SINGH
v.
THIRPAL.

Boys, J.

1925

KEHRI
SINGH
v.

THIRPAL.

Boys, J.

that what might be expected can only be allowed weight in support or where ambiguity, if any, exists.

I will now consider the indications to be found in the actual words of the section. The section may be divided into its two clauses. In the first clause the first phrase which suggests itself for consideration is "all suits and applications." This phrasing is certainly more appropriate to original proceedings. If it had been intended to apply to appeals and revisions, nothing would have been easier than to say so in plain language. In fact, no reference is made in this clause in any way whatever to appeals and revisions. I will refer later to the reference to appeals in the second clause and will endeavour to show that that reference is entirely consistent with the view which I am now discussing.

In the second clause we next find the words "shall take cognizance." In *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (1) PIGGOTT, J., held that it would be "taking cognizance" of the dispute or matter in which the suit was brought, for a higher court to deal in revision with the order of a civil court (District Judge) on appeal from an order of a revenue court. WALSH, J., differed and held that the term was not appropriate to the hearing of the revision from an appellate order. I have no hesitation in expressing my agreement with WALSH, J., for it appears to me difficult to hold that the words "take cognizance" are not very much more appropriate to original proceedings and are not almost invariably applied to original proceedings. I am not prepared to go so far as to say that those words have never been applied by the legislature to appellate or revisional jurisdiction but I am certainly not aware of any such case, though it would not be difficult to quote very

(1) (1916) 14 A.L.J., 281.

many instances of their application to original proceedings.

1925

KEHRI
SINGH
v.
THIRPAL.

Boys, J.

The next phrase calling for comment in the second clause of section 167 is "except in the way of appeal as hereinafter provided." It is these words which, I think, have in some way or other not very clear to me appeared to at least one Judge to lend support to the view that section 167 excluded revisional jurisdiction. So far as I am aware, the words were first referred to in *Damber Singh v. Sri Kishan Dass* (1) where reliance was placed on them in a case where there was no question of the revision of an order of a District Judge, but revision only of an order of an Assistant Collector refusing an application for execution.

In *Muhammad Ehtisham Ali v. Lalji Singh* (2) the report of the judgement of TUDBALL, J., shows that when quoting the earlier case, *Damber Singh v. Sri Kishan Dass* (1), the words "except by way of appeal" have been put in italics, suggesting that the learned Judge was to some extent influenced by them. That again was a case only of a revision of an order of an Assistant Collector. I have suggested above when outlining those two cases that in neither of them was the suggested effect of the words necessary to support the decision. I am unable to appreciate that the words "except by way of appeal" justify any such inference at all. In the view that I take, viz. that section 167 only applies to original proceedings, the words are not superfluous or without meaning; but, on the contrary, they are found to be essential and of import to effect consistency between section 167 and section 196. But for those words it is clear that section 167 would be making illegal entirely the hearing of certain original proceedings in any civil court whilst section 196

(1) (1909) 6 A.L.J., 552.

(2) (1918) I.L.R., 41 All., 226.

1925
KEHRI
SINGH
v.
THIRPAL.

Boys, J.

would be declaring that the hearing of such original proceedings in a civil court was not in every case to be regarded as invalid. The words, then, "except in the way of appeal as hereinafter provided" are necessary and have a definite appropriate intention and effect if the view which I suggest be correct that section 167 only applies to original proceedings.

I am, therefore, of opinion, with the greatest respect for other decisions to the contrary, that decisions which proceeded on the assumption that section 167 has anything to do with appellate or revisional proceedings (except to the limited extent that I have specified) cannot be supported. I, therefore, hold, firstly, that there is nothing in section 167 precluding the hearing by the High Court under section 115 of the Code of Civil Procedure of a revision of an order passed by a District Judge under section 177 of the Tenancy Act; and, further, that it is reasonable that the High Court should have such power, and that to hold that it has such power is in accord with section 193 of the Tenancy Act; and, secondly, that section 167 is only concerned with original proceedings.

For both these reasons I would hold that this Court has power to entertain a revision of an order made by a District Judge under section 177 of the Tenancy Act.

As some of these considerations were urged before us on one side or the other, I have thought it desirable to put them on record and to express my opinion thereon; and, in fact, we cannot really reject the revision on its merits without by implication approving the view that a revision lies.

I agree, however, that it is not a case in which we should refer the matter to a Full Bench, as in the course of the hearing we have been satisfied that the

application has no merits. I agree, therefore, in the order proposed by my brother.

ORDER OF THE COURT.—The appeal is dismissed with costs.

1925

KEHAI
SINGH
v.
THIRPAL.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

SULTAN BEGAM (DECREE-HOLDER) v. SARVI BEGAM
(JUDGEMENT-DEBTOR).*

1925
July, 1.

Civil Procedure Code, section 48; order XXI, rule 11—Execution of decree—Limitation—No vested right in rules of procedure or limitation.

A decree for sale was obtained against two sets of properties situated in Bulandshahr and Meerut in 1907. Before the final decree was passed on the 10th of August, 1908, part of the property situated in the Meerut district was auctioned and purchased by one SB on the 25th of March, 1908. An order absolute under the old Code was passed on the 10th of August, 1908. SB, however, was not impleaded till then. After executing his decree in respect of the properties situated in Bulandshahr, the decree-holder obtained on application, on the 22nd of December, 1922, a certificate of transfer of the decree to Meerut. When the case went to the Meerut court, the present application for execution was made on the 10th of January, 1923. Objection was raised by SB that the present application, not having been made within three years of the last application for execution or any step in aid of execution as against her, was barred, and further that the decree being more than 12 years old, the application was not maintainable.

Held, that the present application was barred under the provisions of section 48 of the Code of Civil Procedure. *Kaunsilla v. Ishri Singh* (1), distinguished. The law of procedure and limitation applicable to an application for execution would be the law actually in force at the time when the

* First Appeal No. 421 of 1924, from a decree of Raj Rajeshwar Sahai, Subordinate Judge of Meerut, dated the 10th of May, 1924.

(1) (1910) I.L.R., 32 All., 499.

1925
 SULTAN
 BEGAM
 v.
 SARVI
 BEGAM.

application is made. The present application was undoubtedly under order XXI, rule 11, of the new Code and there was no ground for holding that section 48, which is a part of that very Code, is inapplicable to this application. *Soni Ram v. Kanhaiya Lal* (1), *Bisseswar Sonamut v. Jasoda Lal Choudhry* (2), *Gopal Das v. Tribhawan* (3), and *Mahant Krishna Dayal v. Musammat Sakina Bibi* (4), followed.

The present application for grant of a certificate could not be deemed to be a continuation of the proceedings in execution taken in respect of the property in Bulandshahr. *Sundar Singh v. Daru Shankar* (5) and *Khetpal v. Tikam Singh* (6), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Munshi *Panna Lal*, for the appellant.

Dr. *Katlas Nath Katju*, for the respondent.

LINDSAY and SULAIMAN, JJ.:—This is a decree-holder's appeal arising out of an execution matter. The respondents took the objection *inter alia* that the application for execution was barred by the three years' rule under article 182 of the Limitation Act as well as by the 12 years' rule under section 48 of the Code of Civil Procedure.

The objection is based on the following circumstances:—A decree for sale was obtained against two sets of properties situated in Bulandshahr and Meerut in the year 1907. Before the final decree was passed, part of the property situated in the Meerut district was sold at an auction and purchased by Sarvi Begam on the 25th of March, 1908. An order absolute under the old Code was passed on the 10th of August, 1908. Sarvi Begam, the purchaser, was however not impleaded till then. Subsequently, Sarvi Begam made a gift of a portion of her interest in favour of Taimur Ali

(1) (1913) I.L.R., 35 All., 227.

(3) (1920) I.L.R., 45 Bom., 365.

(5) (1897) I.L.R., 20 All., 78.

(2) (1913) I.L.R., 40 Calc., 704.

(4) (1916) 1 Pat. L.J., 214.

(6) (1912) I.L.R., 34 All., 396.

Shah some time in the year 1305 Fasli, corresponding to 1918.

1925

SULTAN
BEGAM
v.
SARVI
BEGAM.

The decree-holder first proceeded to execute his decree in respect of the properties situated in Bulandshahr. These execution proceedings went on for several years and part of the decretal amount was realized by sale of the properties situated in that district. Ultimately on the 13th of October, 1922, the decree-holder put in an application, which, however, is not on the record of this case, for execution, or rather for grant of a certificate of transfer of the decree to the district of Meerut. On the 22nd of December, 1922, a certificate was granted and the decree was ordered to be transferred to the court of the Subordinate Judge at Meerut. When the case went to the Meerut court, the present application for execution was made on the 10th of January, 1923. Objection was raised by Sarvi Begam that the present application, not having been made within three years of the last application for execution or any step in aid of execution as against her, was barred, and further that the decree being more than 12 years old, the application was not maintainable.

The learned Subordinate Judge has disallowed the objection so far as the bar of the 12 years' rule is concerned, but has entertained the other objection and dismissed the application.

The decree-holder comes in appeal and on her behalf it is contended that there can be no bar of three years' rule inasmuch as execution proceedings were going on against persons interested in the other part of the mortgaged properties which were jointly liable for the mortgage debt. In the view which we have taken of the other point it is not necessary to go into this matter.

1925

SULTAN
BEGAM
v.
SARVI
BEGAM.

It is clear to us that the present application is barred under the provisions of section 48 of the Code of Civil Procedure. The learned Subordinate Judge, who disallowed the objection, relied on the case of *Kaunsilla v. Ishri Singh* (1). That case was certainly in favour of the view which he took, but for reasons which we proceed to mention, that authority is now no longer binding on us.

It cannot be doubted that, although the decree was passed at a time when the old Code of Civil Procedure was in force, the application for execution of it is made at a time when the new Code is in force. The law of procedure and limitation applicable to an application for execution would be the law actually in force at the time when the application is made. This application is undoubtedly under order XXI, rule 11, of the new Code and there seems to be no good ground for holding that section 48, which is a part of that very Code, is inapplicable to this application.

The argument on behalf of the appellant is that as the decree was passed under the old Code the decree-holder acquired a vested right to apply for execution and that inasmuch as under the old Code there was no such bar of 12 years, his right is in no way affected by the coming into force of the new Code. This contention cannot be accepted. The new Code did not in any way affect his right to execute the decree which he had obtained. It has in no way curtailed his right; it has merely placed a bar of limitation as to the period of time during which he can apply. There was no vested right in the decree-holder to wait for an indefinite period of time in order to apply for execution. The learned Judges who decided the case above mentioned were led away by the supposition that the decree-holder acquires a vested right not only to apply

(1) (1910) I.L.R., 32 All., 499.

for execution but also in the period within which he can apply. Their attention was not drawn to an earlier case of this Court reported in the same volume at page 33, where a Bench of this Court pointed out at page 43 that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary. This view was affirmed by their Lordships of the Privy Council in a case between the same parties reported in *Soni Ram v. Kanhaiya Lal* (1). Their Lordships accepted the view expressed by this Court and held that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary. In view of this authoritative pronouncement we are no longer bound by the views expressed in the case of *Kaunsilla v. Ishri Singh* (2). We may further point out that this view has been accepted by the High Courts at Calcutta, Bombay and Patna *vide* :—*Bissessar Sonamut v. Jasoda Lal Chowdhry* (3), *Gopal Das v. Tribhowan* (4) and *Mahant Krishna Dayal v. Musammat Sakina Bibi* (5).

The next argument advanced on behalf of the appellant is that the present application is not a fresh application for execution at all but that it is really a continuation of the execution proceedings which had been started by the application of the 13th of October, 1922, and inasmuch as that application was within 12 years, the present application being a mere continuation of it is not barred. This argument also has no force. The previous application for grant of a certificate was not an application in the nature of an execution and therefore the present application for

1925

SULTAN
BEGAM
v.
SARVI
BEGAM.

(1) (1913) I.L.R., 35 All., 227.

(2) (1910) I.L.R., 32 All., 499.

(3) (1913) I.L.R., 40 Calc., 704.

(4) (1920) I.L.R., 45 Bom., 365.

(5) (1916) 1 Pat. L.J., 214.

1925

SULTAN
BEGAM
v.
SARVI
BEGAM.

execution cannot be deemed to be a continuation of it. The execution proceedings pending in the Bulandshahr district related to property situated in that district and could not relate to the property in the Meerut district. The prayer in the present application is for sale of other properties situated in Meerut. That such an application for execution is not a continuation of the original application for grant of certificate of transfer is well settled by the authorities of this Court. We may refer in this connection to the cases of *Sundar Singh v. Doru Shankar* (1) and *Khetpal v. Tikam Singh* (2).

We accordingly affirm the decree of the court below and dismiss this appeal with costs.

Appeal dismissed.

1925.
July, 6.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.
KISHAN DEI (DEFENDANT) v. SHEO PALTAN (PLAIN-
TIFF).*

Hindu law—Marriage—“ Karao ” marriage—Ahirs—Custom—Stridhan.

Amongst the Ahir caste marriage in the *karao* form is well-recognized and legitimate.

Where, therefore, two persons of that caste who had been married in the *karao* form died leaving no issue, it was held that the woman's *stridhan* would descend to the husband's relations and not to those of the wife. *Jagannath Prasad Gupta v. Runjit Singh* (3), *Authikesavulu Chetty v. Ramanujam Chetty* (4), *Gabrielnathaswami v. Valliammai Ammal* (5), *Bhaoni v. Maharaj Singh* (6), *Moosa Haji Joonas v. Haji Abdul Rahim* (7), and *Hira v. Hansji Pema* (8), referred to.

THE facts of this case sufficiently appear from the judgement.

* First Appeal No. 172 of 1924, from an order of G. O. Allen, District Judge of Saharanpur, dated the 18th of June, 1924.

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|-----------------------------------|----------------------------------|
| (1) (1897) I.L.R., 20 All., 78. | (2) (1912) I.L.R., 34 All., 396. |
| (3) (1897) I.L.R., 25 Calc., 354. | (4) (1909) I.L.R., 32 Mad., 512. |
| (5) (1918) 53 Indian Cases, 428. | (6) (1881) I.L.R., 3 All., 738. |
| (7) (1905) I.L.R., 30 B-m., 197. | (8) (1912) I.L.R., 37 Bom., 295. |

Dr. Kailas Nath Katju and Babu Saila Nath Mukerji, for the appellant.

1925.

Babu Piari Lal Banerji, for the respondent.

KISHAN
DEI
v.
SHEO
PALTAN.

SULAIMAN, J.—This is a defendant's appeal arising out of a suit for recovery of possession. The plaintiff had a brother Paltu who died some six years ago. He married a woman named Musammat Mano and executed a deed, dated the 29th of January, 1904, under which he stated that he had installed her in his house (*apne ghar men baitha liya hai*) and made a will that after his death she would inherit the whole estate and that his brothers would have no right. There was a further provision that if he were not to keep her, he would pay her Rs. 10 a month regularly. In his lifetime, however, he executed a deed of gift, dated the 29th of April, 1917, under which he transferred the property in dispute to Musammat Mano. The validity of this deed is accepted by the plaintiff and he admits that the property thereafter became the *stridhan* property of Musammat Mano. Paltu died in 1919, and it was a part of the plaintiff's case that after his death there was an agreement between him and Musammat Mano as well as some other relations that she would remain in possession of the property for her life and after her death the plaintiff and his brother would get it. Apart from this agreement, the plaintiff claimed to be the heir of Musammat Mano who died on the 16th of April, 1921, leaving no issue. The defendant is the mother of Anand Prakash, who was the son of Nathu Singh, a brother of Musammat Mano. The defendant denied that the plaintiff was Musammat Mano's heir, and pleaded that she having been married in *karao* form, her heirs were her relations in the paternal line. It was further pleaded that before her death she had executed a will, dated the 14th of April, 1921, under

1925.

KISHAN
DEISHEO
PALTAN.

which she had bequeathed the property in favour of Anand Prakash.

The court of first instance found that the alleged agreement was not established. It found that the marriage of Musammam Mano had been a widow re-marriage in the *karao* form. It came to the conclusion that her marriage could not be said to have been in the Brahma form and that therefore the plaintiff was not her heir. It, therefore, dismissed the suit, considering it unnecessary to go into the question of the alleged will. On appeal the learned District Judge has affirmed the finding that the agreement has not been established and has also affirmed the finding that Musammam Mano's marriage had been in the *karao* form. He, however, came to the conclusion that it must be presumed that her marriage was in the Brahma form and that therefore the plaintiff was the legal heir. He has accordingly remanded the case in order that the other issues may be disposed of.

The argument of Dr. Katju on behalf of the appellant may be summarized as follows:—It is an essential feature of the Brahma form of marriage that there should be a gift by the father or other legal guardian of the girl and that as on the first marriage she passes into a new *gotra*, her paternal relations have no longer any right left to give her away a second time. His contention, therefore, is that a widow re-marriage can never be a Brahma form of marriage. He argues that, unless the plaintiff establishes that the marriage was in one of the four approved forms, he cannot succeed. He contends that a *karao* form of marriage does not come within the definition of any of the first four forms and that in fact about the time when the Mitakshara was written, re-marriages were obsolete and therefore not in contemplation.

On the other hand, the argument of Mr. *Piari Lal Banerji*, on behalf of the respondent, is that no ceremonies are absolutely essential for the validity of a marriage and that if a re-marriage is allowed by custom, the wife has the same rights and status as a maiden who has been married. In order to show that in every case, no matter to which caste the parties belong, there is a strong presumption that the marriage was in the Brahma form, he relies on the cases of *Jagannath Prasad Gupta v. Runjit Singh* (1), *Authikesavulu Chetty v. Ramanujam Chetty* (2) and *Gabrielnathaswami v. Valliammai Ammal* (3). He has gone further and urged that nowadays only two forms exist, namely Brahma and Asura and that if it is not shown that the marriage was in the Asura form, the irresistible conclusion is that it was in the Brahma form. He has pointed out that the findings of the courts below being that no price was paid, the marriage could not have been in the Asura form.

1925

KISHAN
DEI
v.
SHEO
PAITAN.

Sulaiman, J.

The rule of succession to *stridhan* property left by a woman married in *karao* form ought, in the first instance, to be determined with reference to the particular custom of the caste. Where the incidents of this custom can be traced, they will have to be given the force of law. The difficulty arises in a case where no particular custom as to inheritance to *stridhan* is established.

The rule of succession to *stridhan* is stated by Vijnaneswara in the *Mitakshara* as follows :—

“ Of a woman dying without issue, as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha and Prajapatya, the property, as before described, belongs in the first place to her husband. On failure of him, it goes to his nearest sapindas. But, in the other forms of marriage called Asura, Gandharba,

(1) (1897) I.L.R., 25 Cal., 354(355). (2) (1909) I.L.R., 32 Mad., 512.

(3) (1918) 53 Indian Cases, 423.

1925.

KISHAN
DEI
v.
SHEO
PALTAN.

Rakshasa and Paisacha, the property of a childless woman goes to her parents, that is, to her father and mother. The succession devolves first (and the reason has been before explained) on the mother, who is virtually exhibited (first) in the elliptical phrase *pitrigami*, implying "goes" (*gachchhati*) to both parents (*pitarau*), that is, to the mother and to the father. On failure of them, their next-of-kin take the succession."

Sulaiman, J.

This passage is a commentary on the text of Yajnavalkya which is as follows :—

"The property of a childless woman married in one of the four forms denominated Brahma, etc., goes to her husband; but if she leave progeny, it will go to her (daughter's) daughters: and in other forms of marriage (as the Asura, etc.) it goes to her father (and mother on failure of her own issue)."

Now if it were possible to say that the *karao* form of marriage is identical with any of the eight forms mentioned above, there would be no difficulty in deciding which rule of succession should prevail. The difficulty arises when the customary form of marriage is not identical with any of those forms.

Now if we examine the definitions of the various forms of marriage, we will find that the classification into eight forms was not logically exhaustive. It is possible to conceive of a form of marriage which is a mixture and is not strictly identical with any of these eight forms. The Hindu law recognizes custom as a matter of paramount importance, and custom, if it is established, can over-ride the written law. It is, therefore, manifest that we may have customary forms of marriage which are perfectly valid and which do not strictly come within the definitions of any of these eight forms. In a vast country like India with so many castes living in so many different places, multifarious forms of marriage allowed by custom can and have come into existence. It would, therefore, be

inappropriate to put them in any of these eight categories:

Similarly there may be statutory forms, *e.g.*, marriage under the Widows Re-marriage Act, which also may be difficult to class under any of the above forms.

1925.

KISHAN
DHI
v.
SHRO
PALTAN.

Sulaiman, J.

I am, therefore, not prepared to accept the contention of the learned advocate for the appellant that a widow re-marriage can never be deemed to be in the Brahma form. Nor am I prepared to accept the argument of the learned advocate for the respondent that only two forms, Brahma and Asura, are now in existence and the rest are obsolete. When customary forms of marriage are allowed, they may be (provided such is the custom) in any one of the eight forms, or an approach to any one of them. I do not think it is correct to say that unless it be shown that the customary marriage was in the Asura form, it must always be *conclusively* presumed that it was in the Brahma form. In my opinion when the particulars of a customary form of marriage are known then the question of the presumption that it was in the Brahma form becomes of very little importance. That presumption substantially arises only when all that is known is that a marriage did take place. In such cases the presumption is that the marriage was in the Brahma form, no matter what the caste of the parties be. But when the incidents and the circumstances attending the customary form of marriage are known, the presumption can no longer be applied and the court must find of what form it is. When facts are proved, the question of what form the marriage is becomes a question of law.

It is true that the basic principle underlying the first four forms of marriage as well as the fifth form is the gift of the girl by her father or other lawful guardian. The Asura form is distinguished from the

1925.

KISHAN
DEI
c.
SHEO
PALTAN.

first four forms because of the pecuniary consideration. On the other hand, the last three forms of marriage do not contemplate any formal gift by the guardian, though in the case of Gandharba marriage the choice by the girl may be followed by the ordinary ceremonies.

Sulaiman, J.

When re-marriage is allowed by the custom of a caste, such a marriage may not have any disapprobation attaching to it. On the other hand, even among castes which allow the validity of re-marriages, such marriages may be regarded as not a praiseworthy and superior form but a blameworthy and inferior form of marriage. In my opinion the rule of succession ought to vary according as the marriage is not or is blameworthy. For instance if a virgin widow has not passed out of her parent's family and is still under its control, and her parents or other legal guardians in pursuance of the caste custom which allows such marriages give her away in marriage a second time as if she were a maiden, the marriage though a widow-marriage would undoubtedly be in the Brahma form if there is no social censure attaching to it. On the other hand, if a widow, who is not a virgin, herself enters into a matrimonial alliance in a form considered blameworthy by the caste, though recognized by custom as valid, and there is no gift of her by her legal guardians, it may be difficult to see any analogy between such a marriage and the Brahma form of marriage even though there be no consideration paid to her guardians. It may rather be an approach to the Gandharba form where the marriage takes place with the mutual desire of the parties. In this latter case, it would be of an inferior form, particularly when such a marriage is looked down upon by the caste people; but if such a marriage is not considered the least blameworthy, it would be deemed to be of the Brahma form.

The learned advocate for the respondent has referred us to the case of *Bhaoni v. Makaraj Singh* (1), where it was remarked that the Gandharba form, which was nothing more or less than concubinage, had become obsolete as a form of marriage giving the status of wife and making the offspring legitimate. What the learned Judges meant was that in the absence of any custom to that effect such a marriage was not valid in law. They could not have meant to lay down that Gandharba marriages were wholly non-existent and cannot be recognized even if they are allowed by custom.

1925.
KISHAN
DEI
v.
SHEO
PALTAN.

Sulaiman, J.

That the quality of marriage is also a consideration is apparent from a curious case which came up before the Bombay High Court, namely, that of *Moosa Haji Joonas v. Haji Abdul Rahim* (2). In that case the parties to the marriage were Cutchi Memons who performed their marriages in accordance with the Muhammadan law but who under a special custom were governed by the Hindu law of inheritance and succession. The marriage obviously was not in any of the Hindu forms of marriage and yet the learned Judges of the Bombay High Court held that, inasmuch as the particular marriage was in the highest form of union known to Cutchi Memons and was *free from all that was reprehensible and that could call for censure*, it corresponded with the four approved kinds of marriage under the Hindu system and was distinguishable from the four disapproved. They accordingly held that the rule of devolution was the one applied to marriages of the approved form.

Even in the case of *Hira v. Hansji Pema* (3), where a re-marriage of a divorced Koli woman was held to be of the Brahma form, the learned Judges

(1) (1881) I.L.R., 3 All., 738. (2) (1905) I.L.R., 30 Bom., 197.

(3) (1912) I.L.R., 37 Bom., 295.

1925.

KISHAN
DEI
v.
SHEO
PALTAN.

remarked: "Admittedly re-marriage between parties of the Koli caste is valid, and there is nothing before us to suggest that the people of that caste regard it with *any social censure or disapproval*. This seems to us to be a capital consideration when we are administering a system of jurisprudence where established custom plays such an important part as it does in Hindu Law."

Sulaiman, J.

Similarly, in the case reported in *Authikesavulu Chetty v. Ramanujam Chetty* (1) though it was held that "in the absence of any proof to the contrary the marriage must be presumed to be in one of the approved forms," the learned Judges remarked that the presumption of Hindu Law must be applied only with some caution to marriage among the (Kaverais) "caste. . . . The case, therefore, has to be decided upon the evidence given by the parties without the aid of any presumption in favour of either side."

The question unfortunately arises before us in the abstract form whether the widow re-marriage in the *karao* form is a Brahma form of marriage or not. The plaintiff led evidence to prove that Musammam Mano was a virgin maiden and that she was married in the Brahma form and the ceremony of going round the seven steps was also performed. On the other hand, the defendant led evidence to show that she was a widow and that there was no *phera* ceremony and no worship at all and in fact some price was paid for the marriage. Though the courts below have rejected the plaintiff's evidence that she was a virgin maiden and have accepted the defendant's evidence that she had been a widow, they have not thought it necessary to find in detail the actual ceremonies, if any, which took place, nor have they found whether a *karao* form

(1) (1909) I.L.R., 32 Mad., 512 (516).

of marriage is considered an inferior form of marriage and regarded with disapprobation or not. They have, however, found that no price was in fact paid.

It seems to me that one of the important questions which can enable us to determine whether the marriage is in an approved or disapproved form has been left unanswered. I have, therefore, thought it essential to examine for myself the evidence of both parties.

I find that out of the ten witnesses produced by the plaintiff, only four speak of Musammat Mano's marriage. They, however, go so far as to deny that it was in the *karao* form. In cross-examination they were not questioned as to whether *karao* marriages are regarded with disapprobation by the caste. Out of the fourteen witnesses examined by the defendant five speak of her marriage. They say that she was a widow and was married in the *karao* form without any *phera* ceremony. They do not go on to state that a *karao* marriage, though recognized by custom as legal, is considered by the Ahir caste an inferior form of marriage and is not looked upon with approbation.

When a particular form of marriage is recognized by custom, it is to be presumed that the caste approves of it and no social censure attaches to it, unless the contrary is established. The burden lies on the person who asserts the contrary. In the present case when there is no evidence of any kind that a *karao* marriage is regarded by the Ahir caste with disapprobation and generally censured, I must hold that the defendant has failed to discharge the burden that lay on her. It must, therefore, be assumed that the marriage was in one of the approved forms, and the plaintiff is the heir to her *stridhan*. I would on this ground uphold the order of the District Judge.

1925.

KISHAN
DEI
v.
SHERO
PALTAN.

Sulaiman, J.

1925.

KISHAN
DEI
v.
SHEO
PALTAN.

DANIELS, J.—The property in dispute in this case was the *stridhan* property of Musammam Mano now dead. Musammam Mano was a widow and was married by *karao* marriage to Paltu Ram. The parties are Ahirs and it is common ground that in this caste the marriage of widows in the *karao* form is recognized and constitutes valid marriage. It is, therefore, unnecessary to go into the question what formalities are necessary or were observed in this form of marriage. Paltu Ram made a gift of the property in suit to Musammam Mano in 1917. Paltu Ram died in 1919. Musammam Mano died in 1921. The plaintiff Sheo Paltan is Paltu Ram's brother, and his claim, so far as it is now in controversy, rests on the ground that except where the marriage is in a disapproved form, the *stridhan* is inherited in the absence of issue by the husband and his sapindas. The original defendant was Anand Prakash, a nephew (brother's son) of Musammam Mano. He died during the suit and was succeeded by his mother, Musammam Kishan Dei. Her defence, so far as it is now material, is twofold. She alleges that Musammam Mano executed a will in favour of her son, and she asserts the marriage was not in an approved form and that in consequence, even on an intestacy, the *stridhan* goes to the wife's relations and not to those of her husband. The question of the will remains to be tried. The Subordinate Judge held that the plaintiff had failed to prove that the marriage was in the Brahma form, the only approved form now surviving; he was, therefore, not a possible heir even in the absence of a will and had no cause of action for the suit. The suit was accordingly dismissed. The learned District Judge holds that there is a presumption that every valid marriage is in an approved form and that the defendant had failed to rebut that

presumption. It was not suggested before the District Judge that the marriage could be included in either of the four recognized disapproved forms, viz., Asura, Gandharba, Rakshasa and Paisacha. The learned District Judge, therefore, held the marriage to be in an approved form and plaintiff to be entitled to succeed in the absence of a will. He, therefore, remanded the case for decision on the merits. Against that order the present appeal has been filed.

1925.

KISHAN
DEI
v.
SHEO
PALTAN.

Daniels, J.

In this Court the defendant appellant relies on the description of a Brahma marriage given by Manu as being "the gift of a daughter, clad only in a single robe, to a man learned in the Veda, whom her father voluntarily invites and respectfully receives." He argues that a giving by the father is an essential part of this definition, and that it is entirely inapplicable to the marriage of a widow where there is no giving by the father and she herself is a principal in the transaction. As the girl passed into another *gotra* by her marriage, only a virgin could be married in this form. The plaintiff respondent relies on the line of reasoning adopted by the District Judge, and argues further that a Brahma marriage cannot be limited by the narrow terms of Manu's definition which has long become obsolete. The requirement that the husband shall be learned in the Veda shows how archaic the description is. As the other forms became obsolete the conception of a Brahma marriage widened so as to include all valid marriages with the exception of the Asura, the only disapproved form which still survives, and any valid marriage which is not in the Asura form will necessarily be treated as a Brahma marriage.

Now it is obvious that we are dealing here with a state of things not contemplated by Manu or Vijnaneswara. In no respect has Hindu society changed

1925.

KISHAN
DEI
v.
SHEO
PALTAN.

Daniels, J.

and progressed more since the laws of Manu than in its conception of marriage. Six of the eight forms mentioned by him have wholly disappeared. It is probable that in very early times widow re-marriage was allowable, but at the era of the Mitakshara, and even at the earlier period when the Manavadharma-shastra received its final form, it had long ceased to be recognized. They do not, therefore, provide for it, and though they do emphatically assert the binding force of custom, they say nothing as to the class in which marriages recognized as valid by custom shall fall.

Nevertheless some progress has been made in adapting the law to modern social conditions, and we ought in dealing with this case to apply the same principles which have already obtained recognition from the courts. The leading principle is that a marriage is presumed to be in an approved form unless it is shown to be in a disapproved form. This is a reasonable principle and is not contradicted by anything in the Hindu texts. If a marriage is valid at all, the natural presumption is that it is valid in all respects and carries the full privileges and obligations of an approved marriage, and the burden of proving that its results fall short of this is on the person who asserts it.

The presumption in favour of a marriage being in an approved form is supported by numerous authorities, commencing with *Mussumat Thakur Deyhee v. Rai Baluk Ram* (1), and including *Jagannath Prasad Gupta v. Runjit Singh* (2), *Authikessavulu Chetty v. Ramanujam Chetty* (3), *Muthan Chetty v. Ramaswamy Chetty* (4), and several Bombay cases. In *Hira v. Hansji Pema* (5), the marriage

(1) (1866) 11 Moo. I.A., 189.

(2) (1897) I.L.R., 25 Calc., 354(365).

(3) (1909) I.L.R., 32 Mad., 512.

(4) (1906) 16 M.L.J., 550.

(5) (1912) I.L.R., 37 Bom., 295.

of a divorced woman of the Koli caste was treated as being in an approved form. This is a strong authority against the view that only the marriage of a virgin can be treated as approved. The same principle has been applied in *Moosa Haji Joonas v. Haji Abdul Rahim* (1), to a marriage which, being between persons who were only partly governed by Hindu law, was admittedly not strictly in any form contemplated by Manu, and there seems no reason why it should not equally apply to marriages which derive their validity from custom. The binding force of custom among Hindus has been clearly laid down in the Shastras, and it would be superfluous to cite texts or other authorities in support of it.

A suggestion was made in the course of argument in this Court that a *karao* marriage, being contracted by the consent of the parties, should be identified with the Gandharba form of marriage mentioned by Manu. No such suggestion was made in the court below, and it cannot be too strongly repudiated. As Mayne points out in his *Hindu Law*, Chapter IV, the different forms of marriage enumerated by Manu relate to different stages of social progress and their antiquity is in inverse ratio to the order in which they are mentioned. Gandharba is one of the three most primitive, and is really nothing more than the unregulated indulgence of lust. As was pointed out in *Bhaoni v. Maharaj Singh* (2), no ceremonies were necessary (I am aware that the Madras High Court has differed, but the Allahabad view is historically the more correct), and as such was allowable to soldiers, to whom much was allowed which would not be tolerated in ordinary citizens. To identify modern forms of marriage, such as those proposed by Dr. Gaur's Marriage Bill or allowed by

1925.

KISHAN
DEI
v.
SHEO.
PALTAN.

Daniels, J.

(1) (1905) I.L.R., 30 Bom., 197.

(2) (1881) I.L.R., 3 All., 738.

1925.

KISHAN
DEI
v
SHEO
PALTAN.

the Hindu Widows Re-marriage Act, with this primitive and obsolete form would be historically unsound and socially reactionary. To quote Mayne again, "This form belongs to a time when the notion of marriage involved no notion of permanence or exclusiveness. Its definition implies nothing more than fornication. It is difficult to see how such a connection could be treated at present as constituting a marriage, with the incidents and results of such a union." (P. 100, Eighth edition).

The view taken by the learned Judge is, therefore, in my opinion, correct, and I would dismiss this appeal with costs.

By THE COURT.—This appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1925
July, 6.

Before Mr. Justice Banerji.

EMPEROR v. RAM HARAKH PATHAK.*

Act No. XLV of 1860 (Indian Penal Code), section 30—
"Valuable security"—"Is or purports to be"—Document purporting to create rights in immovable property, but deficient as regards mode of execution.

The use of the words "which is or purports to be" in section 30 of the Indian Penal Code indicates that a document, which, upon certain evidence being given, may be held to be invalid, but on the face of it creates, or purports to create, a right in immovable property, although a decree could not be passed upon the document, is contemplated within the purview of that section.

Emperor v. Jawahir Thakur (1), and *Ramaswami Ayyar v. The King-Emperor* (2), distinguished.

* Criminal Appeal No. 435 of 1925, from an order of Partab Singh, Additional Sessions Judge of Basti, dated the 22nd of May, 1925.

(1) (1916) I.L.R., 38 All., 430.

(2) (1917) I.L.R., 41 Mad., 589.

THE facts of this case are fully stated in the judgement of the Court.

Dr. N. C. Vaish, for the appellant.

The Government Pleader (Mr. Sankar Saran) for the Crown.

BANERJI, J.—The appellant has been convicted by the Additional Sessions Judge of Basti under section 447, Indian Penal Code, and sentenced to 2½ years' rigorous imprisonment.

The charge against him is that he destroyed a patta which he and Sheo Agyan had executed in favour of Sheobalak, son of Jagai, on the 11th of February, 1925.

It appears that there was a suit filed in the court of the Munsif of Basti by the accused and some others against Jagai for a declaration that certain land was their *khudkasht*. Jagai defended the suit on the ground that the land was his occupancy tenancy. Jagai was referred by the Munsif under the provisions of section 202 of the Tenancy Act to the revenue court to get his status *qua* this land declared. In the meantime a riot took place in the village, and he, the appellant, and several others were prosecuted for offences of rioting and hurt. While that case was pending, a patta (together with a *kabuliat*) was executed on the 1st of October, 1924, in favour of Sheobalak, son of Jagai, relating to the land which was in dispute in the court of the Munsif. This patta along with many others were executed the same day, and this patta was kept with Thakur Anshman Singh, vakil, at whose house they were executed, on condition that the entire litigation, both civil and criminal, was to be compromised after which the patta would be registered, and Thakur Anshman Singh was to hand over the patta to the adversary of the party that did not carry out the terms of

1925.

EMPEROR
v.
RAM
HARAKH
PATHAK.

1925.
EMPEROR
v.
RAM
HARAKH
PATHAK.

the compromise. The land comprised in the patta belonged to a family of six, of which Ram Harakh and Sheo Agyan were members, and the patta, although written on behalf of all the members of the family, was only signed by Ram Harakh and Sheo-balak.

After this Jagai confessed judgment in the civil case and a decree was recorded by the Munsif against him. It appears that an attempt was made to compromise the riot case, but the trying magistrate did not allow the case to be compromised. The result was that Ram Harakh and others were convicted and sentenced to substantial fines. Ram Harakh refused to register the patta and thereupon Jagai instituted a suit to set aside the "confession decree" on the ground of fraud. This suit was instituted on the 18th of November, 1924, against all six members of the family whose names appear in the first part of the patta, praying that the patta be registered. On the 4th of January, 1925, a written statement was filed by Ram Harakh and Sheo Agyan in that suit, and the averments of fact with reference to this patta were not traversed by these two persons. Various legal pleas were taken as to the validity of the patta, but, as I have stated, there is no controversy as to what was written in the patta. It appears that on the 11th of February the clerk of Ansman Singh gave this patta to Jagai, and Ram Harakh and Jagai had a dispute as to the possession of this document, the result of which was that a portion of it was left in possession of Jagai, and another portion in that of the accused Ram Harakh. These are the main facts upon which the charge has been framed against Ram Harakh. Jagai has in court given details which are at variance with those given by him in the first report, but there can be no doubt, whether the account given

by Jagai in the first report is correct or whether the account now given by him is correct, that the patta was torn in a struggle between Jagai and Ram Harakh, and that it is proved beyond all doubt, and that the account given of it by Balramjit, to whom Jagai made a statement immediately after the occurrence, is substantially correct. The points for consideration in this case are:—

1925.

EMPEROR
v.
RAM
HARAKH
PATHAK.

- (1) whether the document was or was not a valuable security, and (2) whether Ram Harakh destroyed the document - with intent to cause damage or injury to Jagai.

It has been argued by the learned counsel for the appellant that this document was not a valuable security, inasmuch as the document purports to have been executed by six persons, but that two only signed the document, and that therefore it was not a document which could be said to be a valuable security within the meaning of section 30 of the Indian Penal Code. I am, however, of opinion that the document comes within the definition of valuable security in section 30. That document purports to create a legal right in Sheobalak in the land referred to therein. The use of the words "which is or purports to be" in section 30 of the Indian Penal Code to my mind indicates that a document, which, upon certain evidence being given, may be held to be invalid, but on the face of it creates, or purports to create, a right in immovable property, although a decree could not be passed upon the document, is contemplated within the purview of that section. Had it not been so, any forged document, if the forgery was admitted, or any document which was not executed or stamped according to law and on which no decree could be passed by a civil court, could not be called a valuable security. In

1925.

EMPEROR
v.
RAM
HARAKH
PATHAK.

this case we have not the written statement in the civil suit of the other four members of the family. If the two persons, namely, Ram Harakh and Sheo Agyan had signed the document as representing the family, there was nothing illegal in that. Reference has been made to the cases of *Emperor v. Jawahir Thakur* (1), and *Ramaswami Ayyar v. The King-Emperor* (2), by the Government Pleader. I do not think that these cases have any bearing on the point before me. They are clearly distinguishable.

With regard to the next point, I am of opinion that the prosecution has not been able to show that the act of Ram Harakh in destroying the patta was done with the intention of causing any damage or injury to Jagai. The facts as set out in the plaint of Jagai in the civil suit are admitted by the accused. It is admitted that the patta only bore the signature of Ram Harakh and Sheo Agyan. There is no controversy on any point regarding the facts, and I do not see how it could be said that Ram Harakh in any way intended to cause damage or injury to Jagai, and, in the absence of any such intention, the charge under section 477 of the Indian Penal Code fails. I am, therefore, of opinion that the act of Ram Harakh was not proved by the prosecution to have been with intent to cause damage or injury. The act of destroying the patta may have been a very foolish act, but I am of opinion that the conviction of Ram Harakh under section 477 of the Indian Penal Code cannot be maintained. I, therefore, set aside the conviction and sentence of Ram Harakh. He need not surrender to his bail.

Conviction set aside.

(1) (1916) I.L.R., 38 All., 490.

(2) (1917) I.L.R., 41 Mad., 589.

APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Lindsay.*

1925
October, 22.

RAM KUNWAR (DEFENDANT) *v.* GOVIND RAM AND
OTHERS (PLAINTIFFS).*

*Mortgage—Property remaining after redemption in the hands
of the mortgagee and afterwards of his widow to the
exclusion of his sons—Adverse possession—Original
mortgage no longer subsisting.*

Where money due on a mortgage had been paid, but the mortgagee, notwithstanding this, remained in possession of the mortgaged property, and on his death his widow, in spite of the fact that there were sons of the mortgagee in existence, took possession and remained in possession for a series of years, it was held that the widow's possession was adverse to persons claiming as purchasers of the equity of redemption and they could not be allowed to set up their rights under the original mortgage, which had long since ceased to exist.

THE facts of this case are fully stated in the judgement.

Munshi Haribans Sahai and Babu Lalit Mohan Banerji, for the appellant.

Babu Saila Nath Mukerji, for the respondents.

MEARS, C. J., and LINDSAY, J. :—After hearing the arguments in this case we have come to the conclusion that the appeal must be allowed, the decision of the Judge of this Court reversed and the decree of the first appellate court restored.

The suit as framed was a suit for redemption in which the defendant was one Musammat Ram Kunwar, who is now before us as the appellant.

It appears that on the 22nd of November, 1884, one Pahar Singh executed a mortgage in favour of four persons, one of whom was Ram Prasad. The

* Appeal No. 121 of 1924, under section 10 of the Letters Patent.

1925.

RAM
KUNWAR
v.
GOVIND
RAM.

amount of the mortgage money was Rs. 1,000 and admittedly Ram Prasad was interested in this money to the extent of one-fifth only.

On the 17th of October, 1890, Pahar Singh the mortgagor sold some other property of his to three of these mortgagees and he left with them a sum of Rs. 938 in order to discharge the mortgage of 1884. It has been found, and has not been questioned, that Rs. 938 represented the full amount of the mortgage debt at the time this transaction took place.

It is further proved that Ram Prasad, who, as we have said, was interested to the extent of $\frac{1}{5}$ th in this mortgage, received his proportionate share of this money. A further fact which is established by the evidence on the record is that when this money was paid in pursuance of the contract made on the 17th of October, 1890, the mortgage deed which was executed on the 22nd of November, 1884, was returned to the mortgagor Pahar Singh.

After this transaction had taken place, it seems that Pahar Singh, in the year 1891, made a mortgage of this property which had been so released to certain other persons by way of conditional sale. In the year 1894 these mortgagees got a decree for foreclosure, the property was brought to sale in the year 1896 and after the sale had taken place there was a suit for pre-emption which ended in the property being transferred to the plaintiffs in the present suit. They got a pre-emption decree on the 26th of April, 1898.

It appears that, notwithstanding the payment of the mortgage debt in the year 1890, the portion of the mortgaged property in which Ram Prasad was interested remained in possession of Ram Prasad and after Ram Prasad's death, which it seems took place in or

about the year 1892, this property came into the possession of his widow Musammat Ram Kunwar, who is the appellant before us.

1925.

RAM
KUNWAR
v.
GOVIND
RAM.

The plaintiffs, whose title, as we have said, dates back to 1898, brought this suit in the year 1920 against Musammat Ram Kunwar. The position which they took up in the case was that the mortgage of the year 1884 was still subsisting, that the defendant Musammat Ram Kunwar was in the position of a mortgagee and that they were entitled to redeem the property as purchasers of the equity of redemption. A number of defences were raised. The only one with which we are concerned was whether the plaintiffs were entitled to succeed on the case so brought. The case put forward by Musammat Ram Kunwar was that there was no mortgage in existence and that she had been in adverse possession of this property for more than 12 years.

The court of first instance dismissed the suit and gave effect to the plea of adverse possession raised by the lady and this decree was affirmed in appeal by the Subordinate Judge of Mainpuri. There was a second appeal to this Court and the learned Judge has taken the view that the mortgage was still in existence, that Musammat Ram Kunwar could not be heard to set up any adverse title to the property and that consequently the plaintiffs were entitled to have a decree for redemption.

Before us it has been argued that this view taken by the learned Judge of this Court is erroneous. We are of opinion that the learned Judge fell into error in dealing with this question of adverse possession.

To go back to the beginning of things, it is clear that the original mortgagor of the property in the year 1884 was Pahar Singh. It is further quite clear that when Pahar Singh in the year 1890 sold

1925.

RAM
KUNWAR
s.
GOVIND
RAM.

some other property to some of the mortgagees and arranged for the discharge of the mortgage debt that after the payment of this money the person who was entitled to immediate possession of the property mortgaged in 1884 was Pahar Singh and no one else. It is quite clear that the other three mortgagees who had entered into the transaction of sale with Pahar Singh in 1890 had no right whatever to this mortgaged property. Undoubtedly the mortgaged property was to return to Pahar Singh.

Ram Prasad, as we have said, died some time after the year 1890. It is an admitted fact that Ram Prasad left sons who are still in existence and who, according to the Hindu law, were his heirs and entitled to possession of all his property. On the other hand, it is equally clear that Musammat Ram Kunwar, the widow of Ram Prasad, had in the presence of her sons no right whatever to any property belonging to her husband. It is admitted, however, that ever since the death of Ram Prasad this lady has been in possession to the exclusion of her sons and all other persons, and that being so, it is difficult to see how her plea of adverse possession of this property can be repelled.

We do not agree with the view which was taken by the learned Judge of this Court. He seems to have been of opinion that the widow of Ram Prasad could not hold adversely to the mortgagor Pahar Singh or his representatives. He thought that the widow's possession might be adverse to her own sons but he held that any right she had would not be a right adverse to Pahar Singh. In our opinion this is not so, for at the time she entered into possession the person who was entitled to immediate possession of this property was, as we have said, Pahar Singh himself.

While it may be that possession which can be referred to a lawful origin is not to be deemed to be adverse, it is quite clear in the present case that the possession of the widow Musammatt Ram Kunwar never had any rightful origin. On all hands it must be admitted that she took possession as a trespasser. It cannot, therefore, be said that her possession can be referred back to the possession which her husband originally acquired in his capacity as mortgagee. Her possession at once became adverse as against the person who was then entitled to immediate possession, namely, Pahar Singh. The plaintiffs in the present suit derived their title from Pahar Singh and are in the same position as he would have been had he been alive now. In other words, having been entitled to immediate possession of the property and having failed to bring their suit within twelve years from the date on which they became so entitled, their title to the property has been lost.

We hold, therefore, that the rights of this litigation are with Musammatt Ram Kunwar, the defendant appellant, and for the reasons just given we set aside the decree of the learned Judge of this Court and restore the decree of the first appellate court. The appellant is entitled to all her costs in this Court.

Appeal allowed.

1925.

RAM
KUNWAR
v.
GOVIND
RAM.

1925
October, 21.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

MULRAJ (PLAINTIFF) *v.* INDAR SINGH AND OTHERS
(DEFENDANTS).*

Act No. IV of 1882 (*Transfer of Property Act*), section 43—
Mortgage—Effect of mortgagee's knowledge of defective title of mortgagor.

Section 43 of the *Transfer of Property Act*, 1882, cannot be prayed in aid by a mortgagee who was aware that his mortgagor had purported to mortgage a larger interest than he in fact possessed. *Pandiri Bangaram v. Karumooru Subbaraju* (1), *Jagannath v. Dibbo* (2), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Babu Lalit Mohan Banerji and Munshi Narain Prasad Ashthana, for the appellant.

SULAIMAN and MUKERJI, JJ.:—The facts involved in this appeal are as follows:—The appellant who was the plaintiff in the court below obtained a mortgage from the respondent No. 1, Inder Singh, in respect of several properties out of which only one is in dispute in this appeal. In this property Indar Singh had only a reversionary interest on the death of a certain lady at the date of the mortgage. After the mortgage the lady died and the contesting respondent, viz., Babu Girdhari Lal, obtained at an auction purchase this property. When the appellant put his mortgage into suit, Babu Girdhari Lal raised the plea that the mortgage of the property in question by Indar Singh was invalid and did not convey any right to sell it. The appellant relied on section 43 of the *Transfer of Property Act* and the question arose whether the plaintiff was or was not aware at the date of the mortgage of the fact that Indar Singh's

* Second Appeal No. 45 of 1925, from a decree of J. H. Cuming, Additional Judge of Saharanpur, dated the 22nd of September, 1924, confirming a decree of the Subordinate Judge of Saharanpur, dated the 24th of September, 1923.

(1) (1910) I.L.R., 34 Mad., 159.

(2) (1908) 6 A.L.J., 49 (51).

1925

MULRAJ

v.

INDAR
SINGH.

interest in the property in question was only that of a reversioner and not that of an absolute proprietor. The lower appellate court has found in the clearest terms possible that the plaintiff was aware of the true interest of Indar Singh in the property.

Now the question is whether in the circumstances section 43 of the Transfer of Property Act would apply and would entitle the plaintiff to sell the property. If the answer be in the affirmative a further question would arise whether Babu Girdhari Lal would be bound to give up the property in the circumstances of the present case.

We are, however, of opinion that section 43 of the Transfer of Property Act does not apply in favour of the appellant. Section 43 is based on equitable principles. It is only when a transferee is led into the belief of absolute title on the part of the transferor and acts on the representation of the transferor that he is entitled to take advantage of the fact that the transferor later on becomes the owner of the property. If that were not so sections 6 and 43 of the Transfer of Property Act would conflict. Section 43 of the Transfer of Property Act opens with these words "where a person erroneously represents." The word "represents" clearly shows that the person in whose favour the equity is allowed to operate must have acted on the representation. The point has really been settled by numerous authorities and it would be enough to quote two cases only to support our decision, vide *Pandiri Bangaram v. Karumoory Subbaraju* (1), and *Jagannath v. Dibbo* (2).

In view of these decisions the other points raised in the grounds of appeal do not arise.

The appeal is dismissed under order XLI, rule 11, of the Code of Civil Procedure.

Appeal dismissed.

(1) (1910) I.L.R., 34 Mad., 159.

(2) (1908) 6 A.L.J., 49 (51).

PRIVY COUNCIL.

*J. C.
1925
Dec. 4.

JAWAHIR SINGH (DEFENDANT) *v.* UDAI PARKASH AND
ANOTHER (PLAINTIFFS).*

(On Appeal from the High Court at Allahabad).

Hindu law—Alienation of joint family property—Sale by father—Antecedent debt—Limitation—Suit by younger son to set aside sale—Suit by elder son barred—Indian Limitation Act (IX of 1908) ss. 7, 8.

Where a Hindu father has contracted to sell part of the joint family property in order to discharge a mortgage upon other parts of it, but the mortgage has been discharged before receiving the purchase price which the father applies to his own purposes, the sale cannot be supported as having been made to discharge an antecedent debt.

A suit brought by the younger son within three years of attaining majority to avoid the sale is not barred by limitation, although the elder son attained his majority more than three years earlier and had taken no steps to question the alienation.

Semle :—*Ganga Dayal v. Mani Ram* (1), approved; and *Vigneswara v. Bapayya* (2), and *Doraisami v. Nondisami* (3), disapproved.

Decision of the High Court affirmed.

APPEAL (No. 22 of 1924) from a decree of the High Court (May 3, 1922), varying a decree of the Subordinate Judge of Meerut (August 6, 1920).

The respondents, the two younger sons of Harbans Singh, brought the suit in 1919, to recover possession of a moiety share in a village which had been sold by their father Harbans Singh in circumstances which appear from the judgement of their Lordships. Harbans Singh, his eldest son Fateh Singh and the respondents constituted a joint Hindu family governed by the Mitakshara. The appellant defendant was successor in title to Dalip Singh, the purchaser. The

* *Present* : Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1908) I.L.R., 31 All., 156. (2) (1898) I.L.R., 16 Mad., 436.
(3) (1912) I.L.R., 38 Mad., 118.

plaintiffs joined as defendants their father (since deceased) also their elder brother Fateh Singh. Plaintiff respondent No. 1, who attained his majority on July 9, 1919, sued on behalf of himself and his younger brother.

The Subordinate Judge held that the deed was executed for an antecedent debt and was binding upon the plaintiffs. He found that it was not established that the purchase money was applied to immoral purposes. He was also of opinion that the suit was barred by limitation.

On appeal to the High Court the learned Judges (the CHIEF JUSTICE and PIGGOTT, J.) found that Harbans Singh owed Rs. 1,400 to Dalip Singh before the sale in question, and that he could alienate ancestral property only for the purpose of discharging that debt. They further held that the suit was not barred by limitation, following upon that question previous decisions of their own Court in preference to decisions of the Madras High Court applied by the trial Judge. In the result they made a decree for the recovery of the property in suit subject to the payment of Rs. 1,400.

1925, Oct. 30. *Dube* for the appellant: On the question of limitation it is submitted that the view of the Madras High Court in *Vigneswara v. Bapayya* (1) and *Doraisami v. Nondisami* (2) was correct, and the decision in *Ganga Dayal v. Man Ram* (3) erroneous. But as Harbans Singh was alive when the suit was brought, Fateh Singh had not been managing member; it is conceded, therefore, that the failure of Fateh Singh to bring a suit probably did not render the present suit barred. The sale was, however, valid since it was made "in order to raise money to pay off

(1) (1893) I.L.R., 16 Mad., 436.

(2) (1912) I.L.R., 38 Mad., 118.

(3) (1908) I.L.R., 31 All., 156.

1925

JAWAHIR
SINGH
v.
UDAI
PARKASH.

1925

JAWAHIR
SINGH
F.
UDAI
PARKASH.

an antecedent debt." *Sahu Ram Chandra v. Bhup Singh* (1). The judgement in that appeal is not in that respect affected by the judgement in *Brij Narain v. Mangal Prasad* (2). It was not necessary for the purchaser to see that the money was applied in discharge of those debts; it is immaterial that the debts were discharged before the purchase money was paid over.

The respondents did not appear.

Dec. 4. The judgement of their Lordships was delivered by Mr. AMEER ALI.

This is an *ex parte* appeal from a decree of the High Court at Allahabad dated July 3, 1922, and arises out of a suit brought by the plaintiffs on September 14, 1919, for a declaration that a sale effected by their father, Harbans Singh, in 1906, in favour of one Dalip Singh, was not justified by any such necessity as would validate the transaction against the other members of the joint family of which Harbans Singh was the head. Dalip Singh's interests have been acquired by the present appellant, Jawahir Singh. The Trial Judge held that the plaintiffs had not made out a sufficient case to invalidate the sale to Dalip Singh. He was also of opinion that the plaintiffs' claims were barred by the Indian Limitation Act (IX of 1908) as Fateh Singh, their eldest brother, had attained majority long ago and had not questioned the sale. He accordingly dismissed the plaintiffs' suit.

On appeal to the High Court the learned Judges overruled the plea of limitation. They relied on the decisions of their own Court (*Ganga Dayal v. Mani Ram* (3) and in a later case), and differing from the

(1) (1917) I.L.R., 39 All., 437, 446; (2) (1923) I.L.R., 46 All., 95; L.R., 44 I.A., 126, 133, 134. 51 I.A., 129.

(3) (1908) I.L.R., 31 All., 156.

view taken by the Madras High Court in *Vigneswara v. Bapayya* (1) and *Doraisami v. Nondisami* (2) on which the Subordinate Judge had rested his judgment, they held that the conduct of Fateh Singh, the eldest brother, did not affect the undoubted rights of the plaintiffs. They also held that, save and except Rupees 1,400, the defendant appellant had failed to establish that the consideration for the transfer of the property to Dalip Singh was for any such necessity as would make the transaction valid against the sons. They accordingly set aside the order of the first court and made a decree in favour of the plaintiffs for recovery of the property in suit, subject to their paying into Court within three months from the date of their decree, for the benefit of the defendant, Jawahir Singh, the sum of Rs. 1,400. They further directed that if payment should not be made within the prescribed period the suit should stand dismissed with costs throughout.

1925

JAWAHIR
SINGH
v.
UDAI
PARKASH.

From this decree Jawahir Singh has appealed to His Majesty in Council. The same contentions that were urged in the High Court have been advanced before the Board. It becomes necessary, therefore, to set out some of the facts which have either been established or admitted in these proceedings.

Harbans Singh, the father, at the time he sold the property to Dalip Singh, owned a moiety of the village of Shikohpur, in the District of Meerut. The property was admittedly ancestral, in which his sons were jointly entitled. The family consisted of himself and three sons, the eldest of whom, Fateh Singh, is defendant No. 3.

Sometime in 1900 Harbans Singh became involved in debt, and he appears to have executed a mortgage of the property in favour of three money-lenders, Girwar

(1) (1893) I.L.R., 16 Mad., 436.

(2) (1912) I.L.R., 38 Mad., 118.

1925

JAWAHIR
SINGH
v.
UDAI
PARKASH.

Singh and two others. In order to discharge this debt Harbans Singh entered into negotiations with one Udai Singh for the sale of the family property. A sale deed was actually drawn up in his favour for a consideration of Rs. 13,000. Thereupon Dalip Singh put forward a claim of pre-emption in respect of the property that was going to be sold. His right of pre-emption was based on the village custom which, being questioned, came before the Court and was judicially affirmed. The price of Rs. 13,000 was fixed for the joint family's moiety. The pre-emption decree in favour of Dalip Singh bears date the 27th of August, 1906. Dalip Singh, it is admitted, paid Rs. 13,000 to Harbans Singh, which he unquestionably appropriated to his own use. It further appears that whilst the pre-emption suit was proceeding the debt to Girwar Singh and the two other money-lenders was admittedly paid off. At the time of the pre-emption sale Harbans Singh executed a receipt for Rs. 13,000, dated December 19, 1906, in favour of Dalip Singh, stating the particulars of the moneys received by him from Dalip Singh.

As the learned Judges of the High Court point out, save and except the third item in the receipt relating to a promissory note for Rs. 1,000, dated the 30th of March, 1904, executed by Harbans in favour of Dalip which, together with interest, amounted to Rs. 1,400, it showed no consideration of an antecedent character so as to make it binding on the sons. With reference to this part of the transaction the learned Judges say as follows :—

“What we are concerned with is the position of Dalip Singh, who deliberately took it upon himself to thrust himself into this matter by asserting his claim to pre-empt the sale. He, therefore, made himself liable for any legal consequences which might result from

the fact that he was intermeddling with a sale contracted by a Hindu father who had minor sons living jointly with him. He handed over Rs. 2,000 to Harbans Singh in cash on the 19th of December, 1906. He arranged with certain other persons to pay Harbans Singh Rs. 5,000 more in cash and he gave Harbans Singh a mortgage of property of his own for Rs. 4,600, the consideration of which was set down as forming part of the Rs. 13,000 which he was bound to pay under the decree in the pre-emption suit. There remains only a small sum of Rs. 1,400 which was set off against an antecedent debt, that is to say, against money previously advanced by Dalip Singh to Harbans Singh, not on the security of any alienation of joint family property in the hands of the latter, but on a simple promissory note. The date of this promissory note was more than 2½ years prior to the execution of the receipt of the 19th of December, 1906. There seems no reason to doubt that there was real disassociation in fact as well as in point of time between the two transactions."

It is contended that certain expressions used by their Lordships in the case of *Sahu Ram Chandra v. Bhup Singh* (1), that debts contracted by the father "in order to raise money to pay off an antecedent debt" support the view that in the present case the sale to Dalip Singh was to pay off an "antecedent debt," viz., the money due to Girwar Singh and his associates. In their Lordships' opinion the contention is wholly untenable; as the High Court point out, the debt to Girwar and others had already been paid off: and no portion of the Rs. 13,000 which Harbans Singh received from Dalip Singh was applied to its discharge.

The doctrine of "antecedent debt" has been carried far enough; if the present contention is acceded to, it would mean that a contract for loan which never was completed, to pay off a previous debt otherwise discharged, would become "an antecedent debt." The contention is, on the face of it, absurd.

(1) (1917) I.L.R., 39 All., 437, 446; L.R., 44 I.A., 127, 133, 134.

1925

JAWAHIR
SINGH
v.
UDAI
PARKASH.

1925

JAWAHIR
SINGH
v.
UDAI
PARKASH.

On the question of limitation their Lordships concur with the High Court. They are of opinion that there is no substance in this appeal and that it should be dismissed; but without costs, as there is no appearance on behalf of the respondents, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Appeal dismissed.

APPELLATE CIVIL.

1925
June, 12.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

MAHADEO SAHU (PLAINTIFF) v. SARJU PRASAD
TIWARI AND ANOTHER (DEFENDANTS).*

*Act No. II of 1863 (Religious Endowments Act), section 14—
Suit against mutawalli who had sold endowed property—
Nature of reliefs which can be granted in such suit.*

In a suit under section 14 of the Religious Endowments Act, 1863, it is not competent to the Court to set aside a deed of sale of the property alleged to be endowed property, nor can a decree for possession be given.

Where such a suit was brought against a mutawalli who had removed certain idols and sold the endowed property, he was ordered to restore the idols and carry on the duties of mutawalli within a time limited; failing this he was to be removed from his office.

THIS was a suit filed under the provisions of section 14 of the Religious Endowments Act, 1863. The plaintiff alleged that certain premises in the city of Gorakhpur had been dedicated to religious uses as a temple: idols were installed therein and the public were in the habit of worshipping there. He stated that the first mutawalli was one Girdhari Lal Khattri. He was succeeded by his son Mul Narain, and he in turn by his son Gorakh Prasad *alias* Babban. Gorakh

* First Appeal No. 132 of 1922, from a decree of H. E. Holme, District Judge of Gorakhpur, dated the 24th of January, 1922.

Prasad had made over the management to one Ram Kishan Tiwari, whose son Sarju Prasad Tiwari, defendant, on the 8th of July, 1919, had sold the premises to Aziz Husain.

1925

MAHADEO
SAHU
v.
SARJU
PRASAD
TIWARI.

The plaintiff prayed that this sale might be set aside; that Sarju Prasad might be ordered to restore the idols to the temple and to continue the worship, and, if he refused, that another mutawalli might be appointed. There was also a prayer for possession by demolition of the buildings erected by Aziz Husain since the time of his purchase.

The District Judge found that, though the premises in suit had been used for purposes of worship at one time, the place could not be called a public temple but was rather a kind of private chapel with a movable idol or idols. He accordingly dismissed the suit. The plaintiff appealed.

Munshi Shiva Prasad Sinha, for the appellant.

Dr. M. Wali-ullah and Hafiz Mushtaq Ahmad, for the respondents.

The High Court (LINDSAY and KANHAIYA LAL, JJ.), after observing that the Court could not, in a suit under section 14 of the Religious Endowments Act, 1863, give any relief in the shape of cancellation of the sale, or grant a decree for possession of the premises, continued as follows :—

We are satisfied that there is evidence which establishes the plaintiff's case that these premises had been dedicated to purposes of public worship. We, therefore, reverse the judgement of the court below. The only relief which we can award to the plaintiff appellant is that the defendant No. 1, Sarju Prasad, be directed to restore the idols to these premises within the period of six months from the date of this Court's decree and that he be further directed to carry on the duties of mutawalli. In case he fails to do so within

1925

MAHADEO
SAHU
v.
SARJU
PRASAD
TIWARI.

the time so limited, we direct that he be removed from the office of mutawalli. A decree in this sense will be prepared in the office. We leave the parties to pay their own costs in this Court.

Appeal allowed.

1925
July, 7.

Before Mr. Justice Sulaiman and Mr. Justice Boys.

NATHU LAL (OPPOSITE PARTY) v. RAGHUBIR SINGH
AND OTHERS (APPLICANTS).*

Civil Procedure Code, section 151; order XLVII, rules 1 and 7—Review of judgement—What reasons are admissible for granting a review—Appeal—Revision.

When a compromise has been incorporated into a decree, the court cannot review its order on the sole ground that the compromise has been entered into under undue influence or coercion.

The term "any other sufficient reason" used in order XLVII, rule 1, of the Code of Civil Procedure means a reason sufficient on grounds at least analogous to those specified immediately previously.

In as much as fraud, undue influence or coercion cannot be considered as in any way analogous to either the discovery of a mistake or error apparent on the face of the record or the discovery of new and important evidence, that ground alone does not constitute a valid reason for allowing a review of judgement. *Chajju Ram v. Neki* (1), followed.

Foolcomary Dasi v. Woodoy Chunder Biswas (2), *Mirali Rahimbhoy v. Rehmoobhoy Habibbhoy* (3), *Barhamdeo Prasad v. Banarsi Prasad* (4), *Dwarka Dhish Prasad* (5), *Narain Das v. Chiranji Lal* (6), *Tirbeni Kunwar v. Mohan Lal* (7), *Kumar Gopika Raman Ray v. Mahar Ali* (8), *Gulab Koer v. Badshah Bahadur* (9) and *Kotaghiri Venkata Subbamma Rao v. Vellanki Venkatarama Rao* (10), cited in argument.

*First Appeal No. 182 of 1924, from an order of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 9th of October, 1924.

(1) (1922) L.R., 49 I.A., 144; I.L.R., 8 Lah., 127.

(2) (1898) I.L.R., 25 Calc., 649.

(3) (1891) I.L.R., 15 Bom., 594.

(4) (1901) 3 C. L. J., 119.

(5) (1923) I.L.R., 46 All., 245

(6) (1924) I.L.R., 47 All., 361.

(7) (1922) 66 Indian Cases, 558.

(8) (1923) 39 C.L.J., 247.

(9) (1909) 10 C.L.J., 420.

(10) (1900) I.L.R., 24 Mad., 1.

This was an appeal against an order granting a review of judgement in a case in which the decree of the court below (Subordinate Judge of Budaun) was based upon a compromise. The review was granted upon the ground that the compromise on which the decree was based had been procured by fraud, undue influence, and coercion. When the appeal came on for hearing, a preliminary objection was raised that no appeal lay. The objection was sustained and the application was heard as an application in revision. The position taken up by the applicant was that the grounds upon which the Subordinate Judge's order granting the review was based were not grounds which were admissible as falling within the scope of order XLVII of the Code of Civil Procedure.

1925

NATHU LAL

v.

RAGHUBIR
SINGH.

Hafiz *Mushtaq Ahmad* (with him Maulvi *Iqbal Ahmad*), for the appellant.

Mr. S. A. *Haidar* Munshi *Harnandan Prasad* and Pandit S. S. *Sastry*, for the respondents.

Boys, J.—This is an appeal against an order purporting to be in review setting aside a decree on the ground of fraud or undue influence. The application for review alleged undue influence. The review has been granted upon a general finding apparently of fraud, undue influence, coercion, etc.

A preliminary objection is taken that no appeal lies; that it is barred by order XLVII, rule 7, in that none of the only three conditions in which an appeal is allowed is applicable to the case. For the appellant this is now practically conceded, but we are invited to hear the appeal as an application on the revisional side and to set aside the order granting the review on the ground that none of the conditions,

1925
NATHU LAL
v.
RAGHUBIR
SINGH.

which under order XLVII, rule 1, are essential to a review, existed in this case, and that the order granting the review was, therefore, an illegal exercise of jurisdiction. I think this contention is correct. Under order XLVII, rule 1, a review may be admitted on any of the three grounds set out in subsection (1) of the rule. It is conceded that the plea of fraud or undue influence alleged in this case was not accompanied by the discovery of any new and important matter or evidence; nor is it urged that there was any mistake or error apparent on the face of the record. It has, therefore, to be conceded by counsel for the opposite party who obtained the review that his plea did not come within the first grounds. It is, however, urged that the words "for any other sufficient reason" are sufficiently wide to cover a plea of fraud or undue influence.

Now it has been held by their Lordships of the Privy Council in *Chhajju Ram v. Neki* (1) that the other sufficient reason must be "a reason sufficient on grounds at least analogous to those specified immediately preceding". We have had a large number of cases quoted to us, but counsel for the applicant for review has not been able to quote to us a single case in which, recognizing the limited scope laid down by the Privy Council of the words "other sufficient reason", it has been held that fraud unaccompanied by the discovery of new matter is within that limited scope.

We have, therefore, to consider for ourselves whether fraud or undue influence unaccompanied by the discovery of any new fact can be said to be a reason analogous to the two preceding reasons. It clearly is not even remotely analogous to the discovery

(1) (1922) L.R., 49 I.A., 144; I.L.R., 3 Lah., 127.

of a mistake or error apparent on the face of the record. In my opinion it is equally distant from excusable failure to discover new important matter. The essence of that reason is the discovery of something new. The application for review in this case did not even hint at the discovery of any thing new; it merely alleged that with full knowledge of the facts the applicant foolishly allowed himself to be persuaded to take a course which he now alleges was very injurious to his interests. I am of opinion that such a reason is wholly foreign to either of the two first reasons set out in rule 1; that fraud or undue influence unaccompanied by any discovery of new matter does not constitute a ground for review and the order granting review was an illegal exercise of jurisdiction.

1925
NATHU LAL.
v.
RAGHUBIR
SINGH.

I would set aside the order granting review and restore the decree of the court below.

SULAIMAN, J.—I agree. My reasons are different: viz., that the decree was voidable and the right to avoid it accrued when the option was exercised subsequently.

By THE COURT.—In the exercise of our revisional jurisdiction we set aside the order granting review and restore the decree of the court below. The applicant in this Court will have his costs in this Court and in the court below in the matter of the review.

Order set aside.

Decree restored.

REVISIONAL CIVIL.

*Before Mr. Justice Kanhaiya Lal.*1925
July, 9.MUTSADDI LAL (DEFENDANT) *v.* BHAGWAN DAS
(PLAINTIFF).**Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 7 and 102—"Weighman"—Suit for arrears of wages—Limitation.*

A weighman employed to work at a shop is not a household servant, nor an artisan, nor a mere labourer. A suit, therefore, brought by such a person for the recovery of wages due to him will be governed as to limitation, not by article 7 of the first schedule to the Indian Limitation Act, 1908, but by article 102 of the same schedule. *Gordon v. Jennings* (1) and *Morgan v. London General Omnibus Co.* (2), referred to.

THE plaintiff in this case, who was a weighman employed in the shop of the defendant, sued in the Court of Small Causes to recover arrears of wages. The court gave him a decree for a period of 3 years previous to the suit at a rate of Rs. 13 per mensem. Against this decree the defendant applied in revision to the High Court, contending that the court below had wrongly applied article 102 of the first schedule to the Indian Limitation Act to the case, whereas article 7 should have been applied and that the plaintiff was not entitled to a decree for more than one year's arrears under the latter article.

Munshi *Bhagwati Shankar*, for the applicant.

Munshi *Sarkar Bahadur Johari*, for the opposite party.

KANHAIYA LAL, J.—The plaintiff was employed as a weighman in the shop of the defendant on a fixed monthly remuneration of Rs. 13 per mensem. He claimed his wages from the 12th of February, 1921 to the 2nd of February, 1922, which the court below has allowed for a period of three years prior to the suit.

* Civil Revision No. 68 of 1925.

(1) (1882) 9 Q.B.D., 45.

(2) (1883) 12 Q.B.D., 201.

1925

MUTSADDI
LAL
v.
BHAGWAN
DAS.

The question for determination is whether article 7 or 102 is applicable to the suit. Article 7 applies to suits for the wages of a household servant, artisan or labourer and provides a limitation of one year from the date when the wages accrue due. Article 102 applies to a suit for wages not otherwise provided for and allows a period of three years from the date when the wages accrue due. As stated by Stroud (Judicial Dictionary, 2nd edition, p. 2205) wages include payment for any services; yet, in general, the word salary is used for payment of servants of a higher class and wages is confined to the earnings of labourers and artisans; *Gordon v. Jennings* (1). A labourer is defined as a man who digs and does other work of that kind with his hands. But a carpenter is not called a labourer because though he works with his hands his work requires skill and training. *Morgan v. London General Omnibus Co.* (2).

A weighman employed to work at a shop is not a household servant, nor is he an artisan. He can not be treated as a mere labourer employed to do task work, that is, to hold the scales and weigh goods in a shop for a monthly salary. He can be asked to do other work of the shop when free. He has to count and add up, and may have also perhaps to calculate the price on the total quantity weighed, and his work, therefore, cannot be treated as purely manual labour so as to make article 7 of the Act applicable. He may be regarded in fact as a shop-keeper's assistant, and article 102 has been rightly applied to the case. The arrears have been long due and interest thereon has been properly allowed. The application, therefore, fails and is dismissed with costs.

Application dismissed.

(1) (1882) 9 Q.B.D., 45.

(2) (1883) 12 Q.B.D., 201.

REVISIONAL CRIMINAL.

1925
July, 10.

Before Mr. Justice Sulaiman.

HARIHAR DAT v. MAQSUD ALI AND OTHERS.*

Criminal Procedure Code, sections 209, 250 and 253—Complaint comprising several offences, some triable by a Court of Session—Discharge—Order for compensation.

Where a complaint is made to a magistrate relating to several offences, some of which are exclusively triable by a Court of Session, and the magistrate discharges the accused under section 209 of the Code of Criminal Procedure, he is not empowered to pass an order for compensation under section 250 of the Code. *The Crown v. Hamir Chand* (1), *Mahaganam Venkatrayar v. Kodi Venkatrayar* (2) and *Het Ram v. Ganga Sahai* (3), referred to.

THIS was a reference by the Additional Sessions Judge of Gorakhpur whereby he recommended that an order passed by a magistrate under the following circumstances should be set aside. A complaint was filed relating to offences under sections 395, 323 and 330 of the Indian Penal Code. The magistrate discharged the accused. He further ordered the complainant to pay Rs. 50 compensation to the accused. The complainant applied to the Additional Sessions Judge against this order, and the Judge, while refusing to interfere on the merits, referred the case to the High Court. He cited the case of *The Crown v. Hamir Chand* (1). The magistrate in his explanation relied on the case of *Mahaganam Venkatrayar v. Kodi Venkatrayar* (2).

The parties were not represented.

The material portion of the judgement of the Court (SULAIMAN, J.), was as follows :—

The Punjab case is not in point, because the offence with which the accused was charged was one

* Criminal Reference No. 179 of 1925.

(1) (1902) 14 Punj. Rec., Cr. J., p. 39.

(2) (1921) I.L.R., 45 Mad., 29.

(3) (1918) I.L.R., 40 All., 615.

exclusively triable by the Sessions Judge and there was no other offence complained of which could have been tried by the Magistrate himself. The other case referred to by the learned Judge is not applicable. Similarly the case relied upon by the learned Magistrate is not directly in point. In that case the Magistrate had regarded the offence complained of as being one under section 463, Indian Penal Code, (which he had jurisdiction to try) and had tried the accused for that offence and discharged him and ordered compensation. In the High Court it was contended that the offence really fell under section 467, Indian Penal Code, and the order for compensation was therefore illegal. The learned Judges held that inasmuch as the Magistrate had not proceeded illegally in trying the accused for the lesser offence, he was not acting illegally in awarding compensation.

1925

HARIHAR
DAT
v.
MAQSUD
ALI.

Although in this case there was a mention of the offence of section 323 which was triable in accordance with the procedure laid down in Chapter XX, nevertheless, inasmuch as it was joined with offences under sections 395 and 330, the Magistrate could not follow the procedure for the trial of summons cases. As a matter of fact he proceeded to inquire into the complaint under Chapter XVIII of the Code. The order of discharge which he passed must have been under section 209 of the Code. When an accused is discharged under that section, an order for compensation cannot be made against the complainant. The order of compensation was, therefore, illegal. I accept the reference and set aside the order of the Magistrate so far as it directs the complainant to pay compensation of Rs. 50 to the accused. The order of discharge, however, will stand.

Order set aside.

REVISIONAL CIVIL.

1925
Jul. 14.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

BISHESHAR PRASAD PANDE (PLAINTIFF) v. RAGHUBIR AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 115—Revision—Plaint returned by trial court—Order affirmed on appeal by District Judge—Application in revision against the order of the trial court—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 196 and 197.

Plaintiff gave a perpetual lease of certain plots of land to two of his servants. He then executed a *theka* of his zamindari share (including these plots) to Indrasan, giving him the right to realize the rent from the perpetual lessees. After this *theka* was given the lessees relinquished their lease, and the land so vacated was taken possession of by Raghubir Singh, the father of the *thekadar*. Plaintiff sued in a civil court to eject Raghubir Singh as a trespasser. The trial court—after having heard the suit on its merits—found that it had no jurisdiction and directed the plaint to be returned to the plaintiff. An appeal by the plaintiff against this order was dismissed by the District Judge. Held, on application to the High Court in revision, (1) that a revision would lie against the order of the Subordinate Judge irrespective of the fact that it had been affirmed by the District Judge, and (2) that sections 196 and 197 of the Agra Tenancy Act, 1901, had no application to a case where the trial court had not disposed of the case on its merits, but had refused to do so. *Chandu Mal v. Koka Mal* (1), *Ganeshi Lal v. Debi Das* (2) and *Badami Kuar v. Dinu Rai* (3), referred to.

THE facts of this case were as follows :—

The plaintiff, having given a perpetual lease of certain plots of land to two of his servants, subsequently gave a *theka* of his zamindari share to one Indrasan Singh giving him the right to realize the rents due from the lessees. After the *theka* had been given, the perpetual lessees relinquished their lease, and it ap-

* Civil Revision No. 44 of 1925.

(1) (1920) I.L.R., 48 All., 334. (2) (1924) I.L.R., 47 All., 140.

(3) (1886) I.L.R., 8 All., 111.

pears that the land so vacated was taken possession of by Raghubir Singh, the father of the *thekadar*. The plaintiff brought the present suit in the Subordinate Judge's Court and asked for the ejectment of Raghubir Singh as a trespasser. The Subordinate Judge framed and decided issues on the merits. Having decided these, he proceeded to direct the plaint to be returned on the ground that he had no jurisdiction. The plaintiff appealed to the District Judge who affirmed the order of the trial Court. The plaintiff then applied in revision to the High Court.

1925
BISHESHAR
PRASAD
PANDE
v.
RAGHUBIR.

Pandit *Ambika Prasad Pande*, for the applicant.

Munshi *Haribans Sahai*, for the opposite parties.

The judgement of the Court (SULAIMAN and DANIELS, JJ.), after stating the facts at some length, and holding that the Subordinate Judge's order in declining jurisdiction was wrong, proceeded, after considering two subsidiary arguments not relevant for the purposes of this report, to deal with the preliminary objection that no revision lay because, however wrong the order of the Subordinate Judge might have been, his decision had been superseded by the appellate decree of the District Judge.

They continued as follows :—

If the matter were *res integra* we might have felt considerable difficulty regarding it. Section 115 confers revisional jurisdiction on the High Court in cases in which no appeal lies to the Court. Its jurisdiction is not excluded by the fact that an appeal might lie to a subordinate court. The difficulty arises from the principle, which has been affirmed in a large number of decisions, that where an appeal has been preferred and decided, the order or decree of the trial court is merged in that of the appellate court and no longer subsists. This principle was affirmed, with reference to amendment of the trial court's decree, in

1925

BISHESHAR
PRASAD
PANDE
v.
RAGHUBIR.

the Full Bench decision of *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (1); with reference to the passing of a final decree in *Gajadhar Singh v. Kishan Jiwan Lal* (2), and with reference to limitation in *Rup Narain v. Sheo Prakash* (3) and there are many other decisions to the same effect. It is certainly anomalous that it should be open to us to revise the order of the Subordinate Judge when that order has been superseded by an appellate order which is not open to revision. The matter is, however, concluded by the Full Bench decision in *Badami Kuar v. Dinu Rai* (4). That was a decision of a Bench of five Judges with reference to section 622 of the Code of Civil Procedure of 1882, which is substantially identical with section 115 of the present Code. It is pointed out by the respondents that nothing is said in any of the five judgements as to the effect of the trial court's order having been superseded by that of the appellate court. This is true, but it cannot be said that the point was overlooked. The referring order, which is printed on page 113 of the report, expressly mentions that the Munsif's order had been upheld by the Judge in appeal, and STRAIGHT, J., in the illustration which he gives on page 115, refers to the fact that an appeal would lie to the Judge though there would be no second appeal to the High Court. The Full Bench decision was followed in recent years in *Chandu Lal v. Koka Mal* (5), and again in *Ganeshi Lal v. Debi Das* (6). The order of the Munsif having been set aside, the appellate order of the District Judge necessarily falls to the ground with it. We are glad to be able to hold in this case that a revision does lie, because the effect of the contrary view might be to leave the plaintiff without a remedy. If

(1) (1888) I.L.R., 11 All., 267.

(2) (1917) I.L.R., 39 All., 641.

(3) (1921) I.L.R., 43 All., 405.

(4) (1886) I.L.R., 8 All., 111.

(5) (1920) I.L.R., 43 All., 334.

(6) (1924) I.L.R., 47 All., 140.

he filed his suit in the revenue court, that court might well hold that it had no jurisdiction to entertain it. This Court would have no power to revise that order. A revision would lie to the Board of Revenue, and if the Board of Revenue upheld the view of the trial court, the result would be to leave the plaintiff without any means of redress. We allow the application with costs and direct the Subordinate Judge to restore the case to his file and dispose of it on the merits.

1925

BISHESHAB
PRASAD
PANDE
v.
RAGHUBIR

Application allowed.

APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Mukerji.*

1925
July, 15.

AHMAD HUSAIN AND OTHERS (DEFENDANTS) v. MUHAM-
MAD QASIM KHAN AND OTHERS (PLAINTIFFS).*

*Mortgage—Redemption—Integrity of mortgage destroyed—
Mortgagor not entitled to claim more than his own share.*

When the integrity of a mortgage has once been destroyed a mortgagor suing for redemption is not entitled to claim redemption of more than his own share in the mortgaged property. *Shiam Saran v. Banarsi Das* (1), not approved. *Kallan Khan v. Mardan Khan* (2), *Munshi v. Daulat* (3), and *Zaib-un-nissa v. Maharaja Parbhu Narain Singh* (4), referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts so far as they are relevant to the decision on the point of law are contained in the judgement.

Hafiz *Mushtaq Ahmad*, for the appellants.

Maulvi *Muhammad Abdul Aziz*, for the respondents.

* Appeal No. 147 of 1924, under section 10 of the Letters Patent.

(1) (1922) 20 A.L.J., 258. (2) (1905) I L.R., 28 All., 155.
(3) (1906) I.L.R., 29 All., 262. (4) (1917) I L.R., 39 All., 618.

1925

AHMAD
HUSAIN
v.
MUHAMMAD
QASIM
KHAN.

MEARS, C. J., and MUKERJI, J. :—This appeal is against the judgement of a learned Judge of this Court and raises two points.

It appears that the learned Judge decided a question of fact, *viz.*, whether all the representatives of the original mortgagees together had acquired an interest in a part of the mortgaged property or whether some of the representatives of the original mortgagees had acquired that interest. It has been pointed out to us that this question never arose in this Court and the argument of the appellants seems to be right.

In clause (g), paragraph 2, of the plaint, the plaintiffs stated that the original share mortgaged was a five biswa one, that a portion of it, *viz.*, one biswa, had already been redeemed, that two biswas had been purchased by the mortgagees themselves, that two biswas remained under mortgage, that out of these two biswas an $11/42$ share had also been redeemed and that they wanted the redemption of the remaining $31/42$ share out of the two biswas. The defendants in their written statement did not contest this statement of facts. Indeed, in paragraph 1 of their additional statements they accepted this statement of facts and raised the plea in law that the integrity of the mortgage having been broken the plaintiffs were not entitled to ask for redemption of more than their legitimate share. It will be noticed, therefore, that on the pleadings no question of fact, as to whether all the representatives of the mortgagees had purchased or not a share of the mortgaged property, arose. As we understand the pleadings and the proceedings, the pleading brought up before this Court was an entirely new pleading and, in our opinion, it should not have been allowed to be urged in second appeal.

The learned Judge of this Court has held that where the integrity of a mortgage is broken a mortgagor is not entitled to recover by way of redemption more than his share in the property. Mr. Aziz has contested this proposition of law and has cited, as an authority, the case of *Shiagn Saran v. Banarsi Das* (1). In this case the question was never raised very specifically and no authorities were cited. Indeed, the opinion delivered in this judgement is contrary to the opinion expressed in this Court in *Kallan Khan v. Mardan Khan* (2), *Munshi v. Daulat* (3) and *Zaibun-nissa v. Maharaja Parbhu Narain Singh* (4). We are clearly of opinion that the learned Judge from whose judgement this appeal is, was perfectly right in holding that where the integrity of a mortgage is broken a mortgagor is not entitled to claim redemption of more than his own share. Briefly, the reason is this, that the integrity of a mortgage is necessary for the benefit of a mortgagee alone and where that has been broken and a redemption has to be allowed, there is no equity in favour of one of the mortgagors to possess the remaining property, although the same is more than his own legitimate share. If a redemption of a larger share be allowed, the redeeming mortgagor will be in possession of his own share as the owner and will hold the remaining share as mortgagee, having been subrogated to the position of the original mortgagee. The co-mortgagor, who has so far not redeemed his share, will have to ask for redemption on payment and it is immaterial to him whether he goes to a co-mortgagor who has redeemed or to the original mortgagee. In the circumstances, there is no reason why a co-mortgagor should have more than his own share.

1925

ARMAD
HUSAIN
v.
MUHAMMAD
QASIM
KHAN.

(1) (1922) 20 A.L.J., 258.

(2) (1905) I.L.R., 28 All., 155.

(3) (1906) I.L.R., 29 All., 262.

(4) (1917) I.L.R., 39 All., 618.

1925

ARMAD
HUSAIN
v.
MUHAMMAD
QASIM
KHAN.

It has been next contended on behalf of the respondents that the fact that the remaining mortgagors are parties as defendants to the suit was a justification for decreeing the redemption of the entire property in favour of the plaintiffs. This proposition of law clearly goes counter to the case of *Kallan Khan v. Mardan Khan* (1) and *Zaib-un-nissa v. Parbhu Narain* (2). In all redemption cases which are properly framed, not only the redeeming co-sharers should be made parties but also the mortgagors who have not so far joined in the suit for redemption. The necessity of impleading co-mortgagors is this that the share and the right to redeem of the plaintiff cannot be determined behind the back of the non-redeeming mortgagors. It follows, therefore, that if the argument for the respondents be sound, in every case of a properly framed redemption suit the plaintiff would be entitled to redeem not only his own share but also the shares of his co-mortgagors whom he has made defendants. This cannot be right.

The result is that the appeal succeeds. We allow the appeal, set aside the decree of this Court and remand the suit through the lower appellate court to the court of first instance for determination of the share of the plaintiff in the two biswa share in question and the proportionate amount of the mortgage money that they must pay. The plaintiffs will not be allowed to redeem more than their legitimate shares. The appellants will have their costs of the present appeal, but the remaining costs will abide the result.

Appeal allowed.

(1) (1905) I.L.R., 28 All., 155.

(2) (1917) I.L.R., 39 All., 618

FULL BENCH.

Before Mr. Justice Lindsay, Mr. Justice Sulaiman and
Mr. Justice Daniels.

1925
July, 16.

RAM SARUP (APPLICANT) v. GAYA PRASAD (OPPOSITE
PARTY).*

Civil Procedure Code, order IX, rule 13—Decree passed ex parte—Decree set aside by lower appellate court, without having power to direct re-hearing of case—Revision—Jurisdiction of High Court.

The High Court can interfere in revision with an appellate order directing the setting aside of an *ex parte* decree when the appellate court had no power under the provisions of order IX, rule 13, of the Code of Civil Procedure to direct the case to be re-heard.

Hevanchal Kunwar v. Kanhai Lal (1), *Chintamony Dassi v. Raghoonath Sahu* (2), *Gulab Kunwar v. Thakur Das* (3), *Tasaddug Husain v. Hayat-un-nissa* (4), *Nand Ram v. Bhopal Singh* (5), *Sheikh Kallu v. Nadir Bakhsh* (6), and *Neelaveni v. Narayan Reddi* (7) referred to. *Ghuznavi v. The Allahabad Bank Ltd.*, (8), and *Buddhu Lal v. Mewa Ram* (9), distinguished.

THIS was an application in revision from an appellate order of the District Judge of Bareilly setting aside an *ex parte* decree. Both the lower courts found that the absence of the defendant on the date on which the case was decided was intentional, but the appellate court restored the case for extraneous reasons. When the case came up for hearing the opposite party took an objection that, in view of the ruling in *Sheikh Kallu v. Nadir Bakhsh* (6), no revision lay to the High Court. As the Bench concerned entertained doubts as to the soundness of the decision quoted, they ordered the application to be laid before the Chief Justice with a view to the question raised being decided by a larger Bench. The case was ordered to be laid before a Bench consisting of

* Civil Revision No. 20 of 1925.

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|----------------------------------|-----------------------------------|
| (1) (1909) 12 Oudh Cases, 405. | (2) (1895) I.L.R., 22 Calc., 981. |
| (3) (1902) I.L.R., 24 All., 464. | (4) (1903) I.L.R., 25 All., 280. |
| (5) (1912) I.L.R., 34 All., 592. | (6) (1921) 19 A.L.J., 907. |
| (7) (1919) I.L.R., 43 Mad., 94. | (8) (1917) I.L.R., 44 Calc., 929. |
| (9) (1921) I.L.R., 43 All., 564. | |

1925

RAM
SARUP
v.
GAYA
PRASAD.

LINDSAY, J., and the two Judges before whom the case was originally placed, viz., SULAIMAN, J., and DANIELS, J.

Pandit *Uma Shankar Bajpai* and Dr. *Kailas Nath Katju*, for the applicants.

Mr. *B. Malik*, for the opposite party.

LINDSAY, J.—The question which has to be determined by the Full Bench is whether this Court can interfere in revision with an appellate order directing the setting aside of an *ex parte* decree when the appellate court had no power, under the provisions of order IX, rule 13, to give such a direction.

There are two grounds upon which it has been urged before us that the Court cannot subject this order to revision—

- (1) because the party against whom the order has been passed is not without another remedy; and
- (2) because the order does not fall within the purview of section 115 of the Code of Civil Procedure as there is no case which has been decided.

Dealing with these propositions in inverse order I would say that the second one of them is untenable. In my opinion we have before us a case which has been decided. It cannot with any show of reason be maintained that the order complained of is a mere interlocutory order passed in the course of the trial of the suit, for the suit had been brought to an end by the passing of the *ex parte* decree. At the time this order was made there was no suit pending between the parties. The proceedings in which the order was passed were quite distinct from the proceedings constituting the suit.

The defendant had had an *ex parte* decree given against him and was seeking to have it set aside

1925

RAM
SARUP
v.
GAYA
PRASAD.

Lindsay, J.

under the provisions of order IX, rule 13, which gives him a right to have the decree set aside provided he is able to satisfy the court which passed it that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. By these proceedings he was endeavouring to enforce a right which did not, and could not, come into existence until the suit had been decided. These later proceedings being distinct from those in the suit, no order passed in the course of them could possibly be an interlocutory order in the suit. The application was rejected by the first court, and the order of rejection was appealed. The order allowing the appeal is a final order not subject to further appeal and has clearly brought to a termination the proceedings instituted for the setting aside of the *ex parte* decree.

And this being so I have no doubt we have here a "case" which has been decided.

It would be unprofitable to discuss the various rulings concerning the meaning of the word "case" as used in section 115. No definition of the word is to be found in the Code of Civil Procedure and probably no exhaustive definition of the word could be given.

The meaning of the word "case" in section 115 has been well discussed in *Hevanchal Kunwar v. Kanhai Lal* (1), and I would quote the following passage from page 413 of the report:—

"Where there are independent proceedings arising out of a case, such as a proceeding to restore a case dismissed in default, or to set aside a decree *ex parte* for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a case within the meaning of the section (*i.e.*, section 115)."

(1) (1909) 12 Oudh Cases, 405.

1925

RAM
SARUP
v.
GAYA
PRASAD.

I agree with this view and hold, therefore, that in the courts below these proceedings under order IX, rule 13, were a "case" and that that "case" has been "decided."

Lindsay, J. To turn now to the other proposition, the argument is that the applicant here has another remedy available—a circumstance which debars this Court from the exercise of its revisional jurisdiction, and reliance is placed upon the provisions of section 105, sub-section (1), of the Code of Civil Procedure. It is said that in the event of the plaintiff's suit being dismissed after fresh trial, he will have a right of appeal and that in the prosecution of the appeal he would be entitled to challenge the order now under discussion by setting forth in his memorandum of appeal an objection to it on the ground of error, defect or irregularity "affecting the decision of the case." In reply to this it has been argued that as the appeal against the decree in the event contemplated would lie to the same court which has passed the order now complained of, section 105 (1) would be of little or no avail to the appellant.

It would, perhaps, be inexpedient or indiscreet to approach the appellate court with a plea imputing error in its former order, but if the law allows the plea to be raised, the inconvenience of raising it would be no answer to the argument advanced here on behalf of the opposite party.

But I am definitely of opinion that section 105 (1) does not provide any remedy for the prospective appellant in a case like the present.

I would observe, in passing, that on the grammatical construction of the latter part of the sub-section just mentioned, it is the "error, defect or irregularity" in the order which may be pleaded

by way of objection, not the order itself—and that the ground of objection must be that the error, defect or irregularity is one “affecting the decision of the case.” By the words “affecting the decision” I understand that there has been at work something which has influenced the Judge in the mental process of arriving at his decision—that the error, defect or irregularity in the order has, so to speak, warped the mind of the Judge so as to lead him to a wrong conclusion.

1925

RAM
SARUP
v.
GAYA
PRASAD.

Lindsay, J.

If this is the meaning to be attributed to the word “affect”, it seems to me that the word “decision” must necessarily be taken to mean the decision upon the merits.

The learned advocate for the opposite party, while admitting that this view of the interpretation of the word “decision” has been taken, protests against it as involving the introduction into the text of the sub-section of the words “upon the merits” which are not there, and he has been able to fortify his argument by reference to a number of rulings which support it. But although these words are not to be found in the sub-section, they must be supplied by necessary implication if the context so requires—and the use of the word “affect” does, in my opinion, render it necessary that the word “decision” should be taken to mean “decision upon the merits.”

I am quite unable to see how any error, defect or irregularity in the order now complained of could in any sense “affect” the decision of the suit which may follow if the order setting aside the *ex parte* decree is maintained.

The error imputed to the court below is that in spite of its finding that the defendant had no sufficient cause for non-appearance it has directed the *ex parte* decree to be set aside. The order which is

1925

RAM
SARUP
v.
GAYA
PRASAD.

vitiated by this error has, no doubt, provided the occasion for a fresh trial of the suit and has thereby created a possibility that the new trial may result in a decision different from that which was reached on the earlier trial, but that to me appears to be a very different thing from saying that the decision in the second trial will be or can be affected by the preceding error of the appellate court.

I am satisfied that "decision" in section 105(1) means "decision upon the merits." That was the view taken in *Chintamony Dassi v. Raghoonath Sahu* (1). That case has been followed in this Court in *Gulab Kunwar v. Thakur Das* (2), in *Tasadduq Husain v. Hayat-un-nissa* (3), and in other cases more recently decided.

I dissent from the contrary view expressed in *Nand Ram v. Bhopal Singh* (4), and in other cases decided in the same sense. My answer to the reference is that it is competent to this Court to exercise its revisional powers in the case now before us.

SULAIMAN, J.—I agree that the answer should be in the affirmative. I would like to emphasize the fact that the revision before us is from the order of the District Judge passed on appeal. When the appeal was before the Judge, there was certainly a case pending before him. That case has been finally decided so far as the Judge is concerned. No matter is now pending before him at all. His order cannot, therefore, be called an interlocutory one. We undoubtedly have jurisdiction to interfere under section 115 of the Code of Civil Procedure.

DANIELS, J.—The question referred for our decision is whether a revision lies from an appellate

(1) (1895) I.L.R., 22 Calc., 981.

(2) (1902) I.L.R., 24 All., 464.

(3) (1903) I.L.R., 25 All., 280.

(4) (1912) I.L.R., 34 All., 592.

order restoring a case dismissed for default when the appellate court had no power under the provisions of order IX, rule 13, of the Code of Civil Procedure to direct the case to be restored. The revision was necessitated by a doubt on the part of the referring Bench as to the correctness of the decision in *Shaikh Kallu v. Nadir Bakhsh* (1), which held that no revision lay in such a case. The ground of that decision was that the case was covered by the Full Bench ruling in *Buddhu Lal v. Mewa Ram* (2). The Full Bench case is, however, clearly distinguishable. The order passed there was interlocutory. It was an order deciding separately a preliminary issue as to jurisdiction. Here the original suit had been decided when the order complained of was passed. It had been decreed *ex parte* by the Subordinate Judge, and the Subordinate Judge had rejected an application for restoration. The question is whether the restoration proceedings constituted a separate case within the meaning of section 115 of the Code of Civil Procedure. I have no doubt whatever that this question must be answered in the affirmative, and this does not conflict in any way with the interpretation placed on the word "case" by the majority of the Full Bench in *Buddhu Lal v. Mewa Ram* (2). The original suit had been, so far as the trial court was concerned, finally disposed of. The restoration application was a separate proceeding initiated not by the plaintiff in the suit but by the defendant, and the order passed upon it by the appellate court was in no sense an interlocutory order.

BY THE COURT.—The case is now returned to the Bench concerned for disposal in accordance with the answer to the reference.

1925

RAM
SARUP
v.
GAYA
PRASAD.

Daniels, J.

(1) (1921) 19 A.L.J., 907.

(2) (1921) I.L.R., 43 All., 564.

1925

RAM
SABUP
v.
GAYA
PRASAD.

On receipt of the Full Bench decision, the following judgement was delivered :—

SULAIMAN and DANIELS, JJ.:—The answer of the Full Bench to the question referred is in the affirmative. We, therefore, have jurisdiction to entertain this revision.

The lower appellate court had itself found that there was no sufficient cause for the defendant for not appearing when the suit was called on for hearing and that his absence was intentional. The case accordingly did not fall under order IX, rule 13. It is urged before us that apart from order IX, rule 13, the court had inherent jurisdiction to set aside an *ex parte* decree. It is to be borne in mind that the order setting aside the decree was passed by the appellate court to which an appeal had been preferred from an order under that rule. In our opinion it had no jurisdiction outside the provisions of that rule. This was the view clearly expressed by a Bench of this Court in the case of *Sheikh Kallu v. Nadir Baksh* (1). A Full Bench of the Madras High Court, in the case of *Neelaveni v. Narayana Reddi* (2), has come to the same conclusion. The learned advocate for the respondent relies on the case of *Ghuznavi v. The Allahabad Bank Ltd.* (3) which, however, is distinguishable inasmuch as there it was not an *ex parte* decree which had been set aside, but the case itself had been remanded by the appellate court.

In our opinion the court below had no jurisdiction to set aside the *ex parte* decree.

We accordingly allow this revision and setting aside the order of the lower appellate court restore that of the court of first instance. We allow costs to the plaintiff in all courts.

Revision allowed.

(1) (1921) 19 A.L.J., 907.

(2) (1919) I.L.R., 43 Mad., 94.

(3) (1917) I.L.R., 44 Cal., 929.

Before Mr. Justice Lindsay, Mr. Justice Kanhaiya Lal,
and Mr. Justice Daniels.

1925
July, 7,
21.

LAL BAHADUR LAL AND ANOTHER (DEFENDANTS) v.

KAMLESHAR NATH (PLAINTIFF).*

Hindu law—Joint Hindu family—Sale by father—Suit to set aside sale on the ground of want of legal necessity—Consideration valid except as to a small portion only—Form of decree.

Where in a suit to set aside a sale of family property executed by the father of a joint Hindu family for the reason of want of legal necessity it is found that the part of the consideration unsupported by legal necessity is only an insignificant proportion of the whole, the sale should not be set aside.

It is also not correct to say that the form of decree in a suit of this kind which has always been maintained is the form by which the plaintiff is given a decree for possession subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family. On the contrary there are cases in which the suit of the plaintiff has failed altogether, i.e. cases where the portions of the consideration money for which no legal necessity could be found were so inconsiderable as to be liable to be ignored.

Daulat v. Sankatha (1), *Jainarain Pande v. Bhagwan Pande* (2), *Sanmukh Pande v. Jagarnath Pande* (3) and *Dwarka Ram v. Jhulai Pande* (4), referred to.

Babu Piari Lal Banerji, *Pandit Narmadeshwar Prasad Upadhiya* and *Munshi Gadadhar Prasad*, for the appellants.

Munshi Shiva Prasad Sinha, for the respondent.

At the hearing of this appeal the following questions were referred to a Full Bench :—

MEARS, C. J., and MUKERJI, J. :—This is the appeal of Lal Bahadur Lal who, on the 25th of April, 1918, bought a 2 anna share in village Phulpur from Adit Bahadur, the father of the plaintiff. The plaintiff commenced a suit for the setting aside of the sale on the ground that there was no legal necessity

* First Appeal No. 273 of 1922, from a decree of Lakshmi Narain Tandon, Subordinate Judge of Basti, dated the 2nd of May, 1922.

(1) (1924) I.L.R., 47 All., 355.

(2) (1922) I.L.R., 44 All., 683.

(3) (1924) I.L.R., 46 All., 531.

(4) (1923) I.L.R., 45 All., 429

1925

LAL
BAHADUR
LAL
v.
KAMLESHAR
NATH.

for it and that, in truth, there was no consideration. The learned Subordinate Judge analysed the six items which made up the consideration of Rs. 5,995 and we have followed the same course dealing with each and every item because either the appellants or the respondent challenged one or other of them. We need not go into the details of these because they present no special features.

[Their Lordships went through the various items constituting the consideration for the deed in question and thus continued :—]

The addition of all these items allowed comes to Rs. 5,735-1-0 and, therefore, Rs. 259-15-0 is declared to be the amount for which there was no legal necessity.

When these figures were arrived at, there naturally arose the question as to the form of the decree and our attention has been called to what undoubtedly is a conflict of opinion. We think it desirable that this case should be considered and that a Full Bench should be asked to say whether on the figures as found by us the sale should be set aside on payment by Kamleshar Nath of Rs. 5,735-1-0 or whether the sale should be confirmed to Lal Bahadur Lal on his paying to Kamleshar Nath Rs. 259-15-0 or whether a third course should be taken of giving no relief to Kamleshar Nath at all.

The difference between the view taken by Benches of this Court will appear from a perusal of the following cases :—

Ram Dei Kunwar v. Abu Jafar (1).

Bachchan Singh v. Kamta Prasad (2), towards bottom of p. 396.

Jai Narain Pande v. Bhagwan Pande (3).

(1) (1905) I.L.R., 27 All., 494.

(2) (1910) I.L.R., 32 All., 392.

(3) (1922) I.L.R., 44 All., 683.

Dwarka Ram v. Jhulai Pande (1).

Sanmukh Pande v. Jagarnath Pande (2).

Musammāt Allah Jilai v. Qabiz (3) decided by

Mr. Justice MUKERJI and Mr. Justice DALAL, on the 11th June, 1924.

Jiwan Singh v. Gauri Shankar (4), decided by Mr. Justice LINDSAY and Mr. Justice KANHAIYA LAL on the 30th of March, 1925.

Reference might also be made to *Thirumalai Appa Mudaliar v. Nainar Theven* (5), and to *Girdharee Lall v. Kantoo Lall* (6).

On the return of the opinion of the Full Bench let this matter be put up before us again for final orders.

LINDSAY, KANHAIYA LAL and DANIELS, JJ.:—
On the question which has been referred to us by a Bench, we are of opinion that in this particular case the sale should not be set aside but should be confirmed in favour of the purchaser. The consideration which is mentioned in the sale-deed is Rs. 5,995 and it is found that for only a sum of Rs. 259-15-0, out of this sum, no legal necessity has been established. In our opinion this item is an insignificant sum which should be left out of consideration in deciding the question whether the sale should or should not stand. The sale was a sale of a 2 anna share out of a 5 anna 4 pie share and we have no reason to suppose that the precise sum for which legal necessity existed could have been realized by a sale of any less share than that of 2 annas.

We need not discuss the case-law on the subject. The latest case to which we have been referred will be found in *Daulat v. Sankatha Prasad* (7). That refers back to recent decisions which are to be found

(1) (1923) I.L.R., 45 All., 429 (431). (2) (1924) I.L.R., 46 All., 531.

(3) (1924) F.A., No. 69 of 1922, decided on the 11th of June, 1924.

(4) (1925) F.A., No. 40 of 1922, decided on the 30th of March, 1925.

(5) (1922) M.W.N., 804.

(6) (1874) L.R., 1 I.A., 321.

(7) (1924) I.L.R., 47 All., 355.

1925

LAL
BAHADUR
LAL
KAMLESHAR
NATH.

1925
 LAL
 BAHADUR
 LAL
 v.
 KAMLESHAR
 NATH.

in *Jainarain Pande v. Bhagwan Pande* (1) and *Sanmukh Pande v. Jagarnath Pande* (2). The whole case-law on the subject has been referred to in one or other of these rulings. The only authority on which Mr. *Shiva Prasad Sinha* for the respondent relies is the case of *Dwarka Ram v. Jhulai Pande* (3). We do not wish to criticize the merits of that decision, for we are satisfied that on the merits the decision was a perfectly correct one, if we may say so, but we are of opinion that there are certain expressions in the judgement which cannot be accepted literally and which are expressed too widely. We refer to the passage at page 432 of the report which runs as follows :—

“ If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside. But if a portion of the consideration was good and binding on the plaintiff, he would be entitled (sic?) to reimburse it to the defendant. The form of the decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff, subject to his paying to the purchaser so much consideration as was required for the necessities of the family. This is the form of the decree in a suit of this kind which has always been maintained.”

We do not think it is correct to say that if any part of the consideration, however insignificant, was invalid and not binding on the plaintiff, the plaintiff is entitled to have the sale set aside. On the contrary, there is plenty of authority for the proposition that where the portion of the consideration for which no legal necessity can be proved is insignificant, the sale will stand. That was laid down in the case of *Girdharee Lall v. Kantoo Lal* (4), and the relevant passage of that judgement will be found quoted in the Bench decision in *Jainarain Pande v. Bhagwan Pande* (1). Nor again do we think it is correct to say that the

(1) (1922) I.L.R., 44 All., 683.

(2) (1924) I.L.R., 46 All., 531.

(3) (1923) I.L.R., 45 All., 429.

(4) (1874) L.R., 1 I.A., 321.

form of the decree is a suit of this kind which has always been maintained is the form by which the plaintiff is given a decree for possession subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family. On the contrary, there are cases in which the suit of the plaintiff has failed altogether, i.e., cases where the portions of the consideration money for which no legal necessity could be found were so inconsiderable as to be liable to be ignored.

1925
LAL
BAHADUR
LAL
v.
KAMLESHAR
NATH.

The only other matter upon which we are called upon to express an opinion is whether in the circumstances of this case the purchaser is liable to pay to the plaintiff a sum of Rs. 259-15-0 for which no legal necessity has been held to be established. In our opinion the vendee in this case ought not to be made liable to pay this sum. It seems to have been held that this amount was actually paid to the father of the plaintiff, and that being so, we can see no good reason why the vendee should be required to pay the money over again.

Let this answer be returned to the referring Bench.

[On receipt of the opinion of the Full Bench, the following judgement was delivered :—]

MEARS, C. J., and MUKERJI, J. :—The facts of this case will appear from our order, dated the 24th of June, 1925, referring a point of law to a Full Bench. The point referred to is also stated in that order.

The Full Bench have now decided the point and have held that the sale impeached by the son, who was the plaintiff respondent in this Court, should be

1925

LAL
BAHADUR
LAL
v.
KAMLESHWAR
NATH.

upheld in its entirety without any condition attached to the decree.

We accordingly allow the appeal and dismiss the plaintiff respondent's suit with costs throughout.

Appeal allowed.

1925
July, 27.

Before Mr. Justice Lindsay, Mr. Justice Sulaiman and
Mr. Justice Daniels.

FATIMA-UL-HASNA AND OTHERS (APPLICANTS) v. BALDEO
SAHAI AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, order XXI, rule 89; order XLVI—Execution of decree—Sale—Application to set aside sale—Judgement-debtor competent to apply—Reference to High Court—"Reasonable doubt".

A judgement-debtor whose property has been attached and sold has until the confirmation of the sale a right to make an application under order XXI, rule 89, of the Code of Civil Procedure to have the sale set aside but he cannot, by selling such property to a third party, enable the purchaser so to apply. *Pandurang Luxman v. Govind Dada* (1), *Musammat Dhanwanti Kuar v. Sheo Shankar* (2), *Sundaram v. Mausamavuthar* (3), *Yad Ram v. Sundar Singh* (4) and *Bhawani Kuwar v. Mathura Prasad Singh* (5), referred to. *Ishar Das v. Asaf Ali Khan* (6), overruled.

Ordinarily, when there has been a clear pronouncement by a High Court which has not been subsequently doubted the subordinate courts are bound to follow it. But this is not necessarily so in the case of a ruling which has been doubted within the High Court itself and dissented from by other High Courts. In such a case a subordinate court may be justified in making a reference under order XLVI of the Code of Civil Procedure. *Bhanaji Raoji Khoji v. Joseph De Brito* (7), *Naru Koli v. China Bhosle* (8) and *Ajodhia Prasad v. Raghubir* (9), referred to.

* Miscellaneous Case No. 303 of 1925.

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|----------------------------------|----------------------------------|
| (1) (1917) I.L.R., 40 Bom., 557. | (2) (1919) 4 P.L.J., 340. |
| (3) (1921) I.L.R., 44 Mad., 554. | (4) (1923) I.L.R., 45 All., 425. |
| (5) (1912) I.L.R., 40 Calc., 89. | (6) (1911) I.L.R., 34 All., 186. |
| (7) (1905) I.L.R., 30 Bom., 226. | (8) (1888) I.L.R., 13 Bom., 54. |
| (9) (1912) 15 Oudh Cases, 380. | |

THIS was a reference made by the District Judge of Moradabad under order XLVI, rule 1, of the Code of Civil Procedure. The facts out of which it arose appear in the judgement of LINDSAY, J:—

1925
FATIMA-UL-
HASNA
v.
BALDEO
SAHAI.

LINDSAY, J. :—In execution of a decree obtained against the minor heirs of one Abdus Sattar, deceased, certain immovable property of the judgement-debtors was attached and notified for sale. This property was sold by auction on the 20th of October, 1924. On the 23rd of March, 1924, the guardian of the minors had entered into a contract with Musammat Rifaqat-un-nissa for sale to her of the property which was under attachment. At that time the guardian (Musammat Fatima-ul-Hasna) had not obtained from the District Judge the sanction to the transfer which it was necessary for her, as the certificated guardian, to secure. The Judge's sanction was not got till the 25th of September, 1924. Acting on the sanction so obtained, she executed a sale-deed of the property in favour of Musammat Rifaqat-un-nissa on the 23rd of October, 1924, *i.e.*, three days after the court sale. On the 19th of November, 1924, the guardian of the minor judgement-debtors and Musammat Rifaqat-un-nissa presented a joint application to the execution court under order XXI, rule 89 (1), praying that the auction sale should be set aside. Tender of the sum required by the rule to be paid was made. It was represented that the property which has been sold was worth Rs. 7,000 while the price it had fetched at the auction was Rs. 1,200 only. It was prayed that if it should be held that Musammat Rifaqat-un-nissa, the purchaser, was incompetent to make an application under the rule in question, the application should be treated as made on behalf of the judgement-debtors and accepted accordingly. The Munsif to whom the application was made, following the judgement of a Bench of this

1925

FATIMA-UL-
HASNA
v.
BALDEO
SAHAJ.

Lindsay, J.

Court, *Ishar Das v. Asaf Ali Khan* (1), rejected the application. He held that the judgement-debtors having transferred the property after the date of the court sale and before the date of the application, could not apply as they had lost all their interest in the property. He further held that Musammat Rifaquat-un-nisa as a subsequent purchaser under a private sale was not entitled to apply to have the court sale set aside.

The judgement-debtors appealed to the District Judge, who, instead of deciding the appeal, has made this reference asking for the opinion of this Court regarding the true construction of order XXI, rule 89.

On this reference—

Maulvi *Iqbal Ahmad*, for the applicants.

Babu *Piari Lal Banerji*, for the opposite parties.

The case was heard by a Bench of three Judges, who delivered separate judgements. The judgement of LINDSAY, J., after setting out the facts as above, thus continued:—

In his order of reference the District Judge points out that other High Courts have declined to accept the interpretation of this rule laid down in *Ishar Das's* case above referred to.

He cites in this connexion the following rulings—*Pandurang Laxman v. Govind Dada* (2), *Dhanwanti Kuar v. Sheo Shankar Lal* (3) and *Sundaram v. Mausā Mavuthar* (4). He also refers to a Full Bench decision of this Court in which the correctness of the view taken in *Ishar Das's* case was questioned; *Yad Ram v. Sundar Singh* (5). In this latter case one of the Judges, PIGGOTT, J., while describing the construction of order XXI, rule 89, as a “somewhat difficult question of law” held that it was not open

(1) (1911) I.L.R., 34 All., 186.

(2) (1917) I.L.R., 40 Bom., 557.

(3) (1919) 4 Pat. L.J., 340.

(4) (1921) I.L.R., 44 Mad., 554.

(5) (1923) I.L.R., 45 All., 425.

to this Court to decide the question in proceedings taken in revision. He suggested, however, that the matter could be brought before this Court by means of a reference under order XLVI, rule 1, and a similar suggestion was made by WALSH, J., who was clearly of opinion that the view of the law taken in *Ishar Das's* case was not correct, and that the true interpretation of the rule was laid down in the Patna case cited above, *Dhanwanti v. Sheo Shankar* (1). The learned District Judge has taken the hint conveyed in the judgement just mentioned and has now referred the question for our decision.

1925
FATIMA-UL-
HASNA
v.
BALDEO
SAHAI.

Lindsay, J.

Mr. *Piari Lal* has taken a preliminary objection that it is not possible for the Judge to entertain doubt as the rule has already been interpreted in a decision of this Court which he is bound to follow. In support of this argument two cases of the Bombay High Court have been referred to; *Bhanaji Raoji Khoji v. Joseph De Brito* (2), *Naru Koli v. Chima Bhosle* (3), and a case of the Oudh Court (4). The principle so laid down is so obviously correct as to require no further discussion. But this is not an ordinary case. Apart from the fact that the correctness of the judgement in *Ishar Das's* case has been challenged in other High Courts, there is the fact that it has been doubted in this Court in the Full Bench case referred to above and the further fact that an invitation has been thrown out in language which plainly suggests the willingness of this Court to have the question reconsidered. In the circumstances, we are satisfied that the District Judge might well entertain a reasonable doubt and that he was competent to make this reference. The crux of the case is the interpretation in order XXI, rule 89 (1), of the words "person owning such property". Can these words be construed

(1) (1919) 4 Pat. L.J., 340.

(2) (1905) I.L.R., 30 Bom., 226.

(3) (1888) I.L.R., 13 Bom., 54.

(4) (1912) 15 Oudh Cases, 380.

1925

FATIMA-UL-
HASNA
c
BALDEO
SAHAI.

Lindsay, J.

to mean the judgement-debtor? If the words are to be taken in their literal sense and without qualification, I think they would not. We have it that by the time the occasion for an application under rule 89 (1) has arisen, the immovable property "has been sold" and it seems to me impossible to predicate of a person whose property has been sold that he is still the owner in the ordinary acceptance of that term. There has been a sale at which a person has become a purchaser and ordinarily this purchaser would be the owner. Once sold, the property cannot revert to the judgement-debtor unless the sale is set aside for one or other of the reasons mentioned in rules 89, 90 and 91 of order XXI. It is true that the auction-purchaser having bid and having deposited the purchase money does not at once acquire an absolute title as owner; he can only get this by the passing of an order under rule 92 (1) by which the sale is confirmed. But till this order is made, the auction-purchaser is at least the owner *sub modo*; he has acquired the right to the property subject only to the chances of the sale being set aside on any of the grounds upon which the court is entitled to set it aside.

This was the view expressed by their Lordships of the Privy Council in *Bhawani Kunwar v. Mathura Prasad Singh* (1), although, under the old Code (section 316), which was applicable to the case, the title to the property sold did not vest in the purchaser until the date of the certificate of sale—that is, the date of the order confirming the sale. *A fortiori* the same view would be taken now that under section 65 of the present Code the title is deemed to have vested in the purchaser from the date of the sale and not from the time when the sale becomes absolute. But it seems plain that

(1) (1912) I.L.R., 40 Cal., 89.

1925

FATIMA-UL-
HASNA
v.
BALDEO
SAHAI.

Lindsay, J.

rule 89 (1) does not contemplate the auction-purchaser as the "person owning the property", for it is not to be conceived that any auction-purchaser is going to apply to the court to set aside a sale made in his own favour on the terms that he shall deposit five per cent. of the purchase money for payment to himself and shall deposit in addition the entire amount of the decretal debt which may exceed, and frequently does exceed considerably, the amount of his bid. The only provision for an application by the auction-purchaser is to be found in rule 91, by which he can apply to set aside the sale on the ground that the judgement-debtor had no saleable interest in the property sold. If then rule 89 (1) does not treat the auction-purchaser as the owner and if the judgement-debtor cannot be treated as the owner for the reasons above given, the rule is defeated, for the only right to apply would then be in a person "holding an interest" in the property by virtue of a title acquired before the auction sale. The person who holds an interest in property is distinct from the owner. And yet the rule provides for an application by either.

It seems reasonably clear then that if rule 89 (1) is to be given its full effect, the language cannot be construed literally and the expression "person owning such property" cannot mean a person owning such property at the date of the application. The only interpretation which avoids the difficulty is the one by which the expression is construed to mean the person who owned the property at the date of the sale. And this conclusion is, I think, fortified by other considerations. In the Code of 1882, section 310A gave the corresponding right to apply to "any person whose immovable property has been sold"—words which obviously included the

1925

FATIMA-UL-
HASNA
v.
BALDEO
SAHAJ.

Lindsay, J.

judgement-debtor. It is difficult to conceive of any good reason for supposing that it was intended to deprive the judgement-debtor of this valuable right of getting the sale set aside before it is confirmed. I agree with the observations made in this connexion by BATCHELOR, J., in *Pandurang Laxman Upadhe v. Govind Dada Upadhe* (1). Again, if regard be had to the policy of the rule, the interpretation above suggested is more acceptable than the literal interpretation. It cannot be doubted that the rule was enacted for the benefit of the judgement-debtor. It gives him a last chance of getting the sale set aside before confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction-purchaser for the loss of his bargain. If at the last moment he is able to make an arrangement by which he can liquidate the debt and compensate the auction-purchaser as well, why should he be debarred from applying under the rule?

It is notorious that a forced sale of immovable property often results in a price far below the real value and it is obviously much to the advantage of the judgement-debtor to allow him to get a better price if he can. He may not be able to retain the property after the sale is set aside, but by paying off the decretal debt he stands free of further liability and can protect any other property he may have. The decree-holder gets what he is seeking, namely, full satisfaction of his claim, while the auction-purchaser gets reasonable compensation for his disappointment. The rule interpreted and worked in this sense operates for the benefit of all concerned.

It is upon these considerations that other High Courts have been led to hold that in rule 89 (1) the person owning the property is the person who

(1) (1917) I.L.R., 40 Bom., 557 (560)

owns it at the date of the sale. *Vide* the Bombay case cited above; the case of *Musammatt Dhanwanti Kuar v. Sheo Shankar Lal* (1) and *Sundaram v. Mause Maruthar* (2). I am of opinion that we should give effect to this view in preference to that taken by the Bench of this Court in *Ishar Das v. Asaf Ali Khan* (3).

1925

FATIMA-UL-
HASNA
v.
BALDEO
SAHAI.

The construction adopted by our Court is too rigid, and fails, in my opinion, to allow full scope to the policy of the rule. It operates harshly against the interests of the judgement-debtor and that is a result to be avoided, if possible.

I would, therefore, answer this reference by saying that in order XXI, rule 89 (1) the words "person owning the property" mean the person owning the property at the date of the auction-sale; that in the particular case now before us the application under the rule in question in which the judgement-debtors joined should have been allowed; and that a person to whom a judgement-debtor purports to convey subsequent to the date of the auction-sale is not entitled to apply under the rule, being by the terms of the rule itself excluded on the ground that any title he may have acquired was not acquired before the auction-sale.

SULAIMAN, J.—I concur in the conclusion. The preliminary objection has no force. As to the merits there is undoubtedly a conflict of opinion and the Rules Committee might well have considered the advisability of amending order XXI, rule 89. A Bench of the Allahabad High Court, in the case of *Ishar Das v. Asaf Ali Khan* (3), held that "where a judgement-debtor, after the execution sale, has executed a registered deed of transfer in favour of

(1) (1919) 4 Pat. L.J., 340.

(2) (1921) I.L.R., 44 Mad., 554.

(3) (1911) I.L.R., 34 All., 186.

1925

FATIMA-UL-
HASNA
1.
BALDEO
SAHAI.

Sulaiman, J.

a third party, neither the judgement-debtor nor such transferee is competent to apply under order XXI, rule 89." On the other hand, other High Courts, though holding that such transferee cannot apply, have held that the judgement-debtor is not disentitled from applying. It is unnecessary to refer to all the cases. Reference may be made only to *Pandurang Laxman Upadhe v. Govind Dada Upadhe* (1), *Sundaram v. Mause Maruthar* (2) and *Musammatt Dhanwanti Kuer v. Sheo Shankar Lall* (3).

The auction sale of a judgement-debtor's interest does not necessarily before confirmation extinguish the interest of the judgement-debtor in the property. The ownership of the property does not *ipso facto* vest in the auction-purchaser before the confirmation. The property cannot automatically pass to the auction-purchaser as soon as the sale takes place, for he has fifteen days to deposit the whole purchase money. In default of payment the property is to be re-sold as the property of the judgement-debtor, and obviously not as the property of the defaulting auction-purchaser. In my judgement the judgement-debtor continues to own it till the sale is confirmed, but as soon as the sale is confirmed, the vesting of the interest in the auction-purchaser relates back under section 65 to the date of the sale. I am, therefore, clearly of opinion that the judgement-debtors did not cease to own the property merely because the property had been knocked down to an auction-purchaser but its sale had not yet been confirmed by the court.

As to the effect of the private transfer by the judgement-debtors after the auction sale, I am of opinion that in spite of it the judgement-debtors

(1) (1916) I.L.R., 40 Bom., 557.

(2) (1921) I.L.R., 44 Mad., 554.

(3) (1919) 4 Pat. L.J., 340.

must be deemed to still own the property in these proceedings. It is true that a private sale during an attachment or even after an auction sale is not absolutely void for all purposes. Section 64 of the Code of Civil Procedure merely says that it shall be void as against all claims enforceable under the attachment. But in proceedings where a claim under the attachment is being enforced, it cannot be doubted that such a transfer is void. The present proceedings are between the decree-holder and the auction-purchaser on the one side and the judgement-debtors and their transferee on the other. In these proceedings the private transfer by the judgement-debtors must be deemed to be absolutely void, ineffectual and a nullity. In fact it is on that assumption that the decree-holder and the auction-purchaser would ask the court to confirm the sale. Can they then consistently plead this very transfer as a bar to the judgement-debtors' application? A transaction which is treated by them as absolutely void cannot with good grace be set up as a bar against the judgement-debtors. So far as these proceedings are concerned it must be assumed that no valid transfer has really taken place; it must, therefore, be assumed that the interest which the judgement-debtors possessed has not passed from them, and that they will be deemed to continue to be the owners till confirmation. If the sale is set aside and the attachment also withdrawn, the private transfer would become valid. If the sale is confirmed, the auction-purchaser's title will date back to the time of the sale.

DANIELS, J.—I concur in the conclusion that the judgement-debtor has a right to apply but the subsequent purchaser has not. It is clear that a purchaser from the judgement-debtor subsequent to an auction-sale cannot apply under order XXI, rule 89, of the

1925

FATIMA-UL-
HASNA
v.
BALDEO
SAHAJ.

1925

FATIMA-UL-
HASNA
v.
BALDEO
SAHAL.

Daniels, J.

Code of Civil Procedure. He is precluded by the terms of the rule as his interest was not acquired before the sale. The question whether the judgement-debtor who has parted with his remaining interest by a private treaty can do so is more difficult and there is much to be said, on the literal meaning of the rule, for the view taken in *Ishar Das v. Asaf Ali Khan* (1). Now, it is clear that for the purposes of the rule the judgement-debtor is treated as the owner notwithstanding the existence of the unconfirmed auction-sale. The words "owning such property" with reference to a time immediately after the auction-sale must apply either to the judgement-debtor or to the auction-purchaser. The latter cannot possibly have been intended. I, therefore, agree with SULAIMAN, J. that for the purpose of a proceeding under rule 89, the object of which is to get the sale set aside on the condition of compensating the purchaser and paying off the full amount due to the decree-holder, it cannot operate to divest the judgement-debtor of such ownership as remains to him after the auction-sale. I am conscious that it is paradoxical to hold that a judgement-debtor, who cannot in any event ultimately retain the property, is treated as still owning it for the purpose of the rule, but the fact that the rule has been construed in half a dozen different ways by different Judges sufficiently shows that it is impossible to find any construction to which no objection can be taken. The construction adopted above, which is substantially that of my brother SULAIMAN and that taken by BATCHELOR, J. in *Pandurang Laxman Upadhe v. Govind Dada Upadhe* (2), is least open to objection and best carries out the intention of the Legislature. I agree with Mr. Justice SULAIMAN that our judgements in this

(1) (1911) I.L.R., 34 All., 186.

(2) (1917) I.L.R., 40 Bom., 557.

case should be placed before the Rules Committee with a view to the amendment of the rule.

BY THE COURT.—The questions formulated by the District Judge in this reference were :—

(1) Can a judgement-debtor make an application under order XXI, rule 89?

Our answer to this question is—Yes.

(2) Can a purchaser from a judgement-debtor subsequent to the date of the sale apply under this rule?

Our answer to this is—No.

Let these answers be returned to the District Judge together with copies of our orders.

Reference answered.

REVISIONAL CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.
AHMAD HUSAIN KHAN (DEFENDANT) v. HARDAYAL
(PLAINTIFF).*

1925
July, 16.

Civil Procedure Code, order IX, rule 13—Suit dismissed for default—Conditional order restoring suit on payment of costs.

An order restoring a case dismissed for default on condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order, but, on the contrary, is an order contemplated by order IX, rule 13, of the Code of Civil Procedure.—*Jagarnath Sahi v. Kamta Prasad Upadhya* (1) and *Nand Lal v. Kishori* (2), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu A. P. Bagchi, for the applicant.

Pandit Uma Shankar Bajpai, for the opposite party.

* Civil Revision No. 50 of 1925.

(1) (1914) I.L.R., 36 All., 77.

(2) (1914) 12 A.L.J., 1270.

1925

AHMAD
HUSAIN
KHAN
v.
HARLAHAL.

SULAIMAN and DANIELS, JJ.:—This is an application in revision under the following circumstances. A suit was decreed *ex parte* against the applicant on the 29th of April, 1924. On the 26th of July, the Subordinate Judge set aside the *ex parte* decree on condition of the defendant paying the plaintiff Rs. 40 as costs by the 28th of July. The defendant did not at the time make any objection that the time allowed was too short. On the 28th of July the defendant, having failed to deposit the money, applied for ten days' further time, which was refused. An appeal from this order was dismissed by the learned District Judge. It appears to us that because the learned Subordinate Judge in the exercise of his discretion considered that the defendant was not entitled to an extension of time for payment of the money, this does not amount either to a failure to exercise jurisdiction or to a material irregularity in the exercise of jurisdiction against which a revision can lie. The applicant has drawn our attention to a decision in *Jagarnath Sahi v. Kamta Prasad Upadhyaya* (1) in which the opinion was expressed that a conditional order was not a proper form in which to pass the order, and that an order should first be made directing payment of the money by a certain time and then a separate order passed restoring or declining to restore the suit according as the money had been paid or not. The real question in that case was as to the order from which an appeal lay, and it was held that the final order dismissing the suit or refusing to restore the suit was the one from which an appeal could be filed. In a later case, *Nand Lal v. Kishori* (2) to which one of the same learned Judges was a party, some doubt appears to have been felt

(1) (1914) I.L.R., 36 All., 77.

(2) (1914) 12 A.L.J., 1270.

as to the correctness of the earlier ruling. However that may be, to prevent any misapprehension we wish to lay down definitely that an order restoring a case dismissed for default on condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order, but, on the contrary, is an order contemplated by order IX, rule 13, of the Code of Civil Procedure. This application has no force, and we dismiss it with costs.

1925

AHMAD
HUSAIN
KHAN
v.
HARDAYAL.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

DIP PRAKASH AND OTHERS (OBJECTORS) v. BOHRA
DWARKA PRASAD AND ANOTHER (DECREE-HOLDERS).*

1925
July, 15.

Civil Procedure Code, section 11—Res judicata—Execution of decree—Principle of res judicata how far applicable to proceedings in execution.

Although neither section 11 of the Code of Civil Procedure nor any of its explanations can in terms apply to proceedings in execution, because the question arises in the same suit and not in a second suit, yet where a point has been either expressly or by necessary implication decided in the execution department that decision binds the parties in all subsequent proceedings. *Ram Kirpal v. Rup Kuari* (1), *Mangul Pershad Dichit v. Grija Kant Lahiri* (2), *Raja of Ramnad v. Velusami Tevar* (3), *Dwarka Das v. Muhammad Ashfaq-ullah* (4), *Kalian Singh v. Jagan Prasad* (5) and *Sheo Mangal v. Musammat Hulsa* (6), referred to.

THE facts of this case were as follows:

The plaintiffs obtained a decree from the appellate court on the 15th of December, 1920, ordering

* Second Appeal No. 1844 of 1924, from a decree of Raj Rajeshwar Sahai, Third Additional Subordinate Judge of Aligarh, dated the 25th of September, 1924, reversing a decree of Jagdishwar Nath Kaul, Munsif of Hathras, dated the 31st of March, 1924.

(1) (1883) I.L.R., 6 All., 269. (2) (1881) I.L.R., 8 Calc., 51.
(3) (1920) L.R., 48 I.A., 45. (4) (1924) I.L.R., 47 All., 86.
(5) (1914) I.L.J., 37 All., 589. (6) (1921) I.L.R., 44 All., 159.

1925

DIP
PRAKASH

v.

BOHRA
DWARKA
PRASAD.

the defendants to remove certain walls and sheds which they had erected on the disputed land, and for an injunction "not to erect any building on the land." On the 30th of April, 1923, the decree-holders put in an application for execution, complaining that the defendants in spite of the injunction, had constructed a *pacca* pavement and several walls and had put a tin roof on the latter. In this application they expressly asked to execute the decree by demolition of the walls, the tin roof and the newly constructed pavement. Notice was issued to the judgement-debtors fixing the 30th of July, 1923. On this date the judgement-debtors appeared and put in a written objection that the decree was not executable on the ground that the parties had compromised their dispute and the constructions had been made in pursuance of that compromise. In the objection there was no suggestion that the constructions complained of were not in defiance of the injunction. On the 2nd of August, 1923, the execution court, after hearing the evidence of the parties, held that no compromise had been proved, and accordingly dismissed the objection. No further objection was filed by the judgement-debtors and on the 27th of August, 1923, the court ordered that, inasmuch as the judgement-debtor's objections had been dismissed, process should be issued to the Amin to carry out the order of execution and report. Before, however, the order could be fully carried out, an order staying further proceedings was passed on the 29th of August, 1923, because a declaratory suit was instituted by the sons of the judgement-debtors. This last mentioned suit was dismissed on the 17th of December, 1923. On the 18th of December, 1923, on receipt of a report that the civil suit had been dismissed, the court ordered that the previous order

dated the 27th of August, 1923, should be carried out, and the papers were sent to the Amin for compliance. In obedience to this order the Amin got the walls, the tin roof and the pavement removed from the land.

1925

DIP
PRAKASH
v.
BOHRA
DWARKA
PRASAD.

After this the judgement-debtors filed a set of objections complaining that the decree-holders had fraudulently and without any right got the pavement removed, causing a loss to them of Rs. 5,100. They, therefore, prayed that the decree-holders might be ordered to get the pavement which they had had demolished rebuilt or to pay Rs. 5,100 on account of the cost of its construction to the objectors. The decree-holders replied that the construction of the pavement was contrary to the terms of the decree, and further that the objectors had no right to raise this objection, which was barred by the principle of *res judicata* and estoppel. They also disputed the amount of the alleged loss.

The execution court held that there was no bar of *res judicata*. It further held that the pavement was not a "building" within the meaning of the decree and that therefore the decree-holders had no right to get it removed. It accordingly ordered that the decree-holders should rebuild the pavement within four months, otherwise they would be liable to pay Rs. 3,490-5-4 to the objectors. On appeal the Additional Subordinate Judge agreed with the first court that the objection was barred neither by *res judicata* nor by estoppel. He held, however, that the brick pavement was a "building" within the meaning of the decree. He accordingly allowed the appeal and dismissed the objection.

The judgement-debtors appealed to the High Court.

Sir *Tej Bahadur Sapru* and Dr. *Kailas Nath Katju*, for the appellants.

1925

DIP
PRAKASH
v.
BOMRA
DWARKA
PRASAD.

Dr. *Surendra Nath Sen* and *Munshi Panna Lal*,
for the respondents.

The judgement of *SULAIMAN, J.*, after stating
the facts as above, thus continued:—

I am of opinion that this appeal should fail on
legal grounds. When notice was issued to the
Sulaiman, J. judgement-debtors to show cause why execution
should not proceed and the judgement-debtors ap-
peared before the court, they had full notice of the
decree-holders' prayer for the removal of the dis-
puted pavement. They had ample opportunity to
object and urge that the construction of the pave-
ment was not in contravention of the injunction.
This objection they failed to raise. The objec-
tion which they did raise was disallowed and on
the 27th of August, 1923 execution was ordered.
Subsequently the proceedings were stayed because of
another pending suit, but when that suit was dis-
missed, execution was ordered afresh. Process was
issued to the Amin with specific instructions to
demolish the pavement along with the other con-
structions complained of. The Amin went to the spot
and carried out the order. All this time the objec-
tors were sleeping. It was their duty to raise the
objection, before it was too late, that the pavement
should not be removed. The order directing execu-
tion by removal of the pavement was based on the
assumption that the pavement was a building within
the meaning of that term as used in the decree. Had
the execution court been invited to consider and had
it concluded that the pavement was not a building,
it would never have ordered its removal. It must,
therefore, be assumed that the question that this
pavement was liable to be removed in execution of
the decree was by necessary implication decided by
the court against the judgement-debtors. They are,
therefore, not entitled to come to court and ask for

damages for the loss which they have suffered on account of such execution.

It is true that section 11 of the Code of Civil Procedure or any of its explanations, cannot in terms apply to an execution proceeding because the question arises in the same suit and not in a second suit. But, as observed by their Lordships of the Privy Council in the case of *Ram Kirpal v. Rup Kuari* (1) an order in execution may be "as binding between the parties and those claiming under them as an interlocutory judgement in a suit is binding upon the parties in every proceeding in that suit, or as a final judgement in a suit is binding upon them in carrying the judgement into execution. The binding force of such a judgement does not depend upon section 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation." See also the Privy Council case of *Mangul Pershad Dichit v. Grija Kant Lahiri* (2).

Where, therefore, a point has once been expressly decided in the execution department, there can be no doubt whatsoever that that decision binds the parties in all subsequent proceedings. In cases where a point has not been directly decided but is such as must be deemed to have been necessarily decided before an order of execution was passed, the decision has also been held to have a similar binding force. For instance, objections that the application is not in accordance with the law, or that it is barred by time or that the decree is not capable of execution or that the court has no jurisdiction to entertain the application or that the person applying for execution has not the right to do so, are objections, which if not raised before the execution is ordered, have been held in several cases to have been decided adversely

(1) (1883) I.L.R., 6 All., 269 (274). (2) (1881) I.L.R., 8 Cal., 51,

1925

DIP
PRAKASH
v.
BOHRA
DWARKA
PRASAD.

Sulaiman, J.

1926
DIP
PRAKASH
v.
BOHRA
DWARKA
PRASAD.

to the objectors by the execution order. Reference may be made to the recent case of *Raja of Ramnad v. Velusami Tevar* (1) decided by their Lordships of the Privy Council. At page 48 LORD MOULTON observed: "It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it," though in that case such a plea was in fact brought forward and decided upon. See also the case of *Dwarka Das v. Muhammad Ashfaq-ullah* (2) and the cases cited therein.

On the other hand, in cases where the decretal amount is in dispute it has been held that a mere order directing execution does not imply a decision that the amount entered in the application for execution is necessarily correct, and it has been held that there is nothing to prevent the court at a subsequent stage from correcting the amount which the decree-holder is entitled to recover. In the case of *Kalian Singh v. Jagan Prasad* (3), it was held that if a judgment-debtor does not take exception to the amount erroneously set forth in an application for the execution of the decree as being the sum due, he is not prevented from doing so on a subsequent application for the execution of the same decree. Similarly in the case of *Sheo Mangal v. Musammatt Hulsa* (4) the vendee decree-holder, who was at least entitled to execute his decree for costs, had included a sum of Rs. 380-15-0 in his application. An order issuing process was made but before the order could be executed the vendee gave up his claim for Rs. 380-15-0 and applied to be allowed to retain the property. It was held that the order issuing process, passed in favour of the decree-holders, did not preclude them from saying that they were not entitled to recover

(1) (1920) L.R., 48 I. A., 45.

(2) (1924) I.L.R., 47 All., 86.

(3) (1914) I.L.R., 37 All., 589.

(4) (1921) I.L.R., 44 All., 159.

the sum of Rs. 380-15-0 by way of execution but that they were entitled to the property itself. It was pointed out that there was some amount recoverable by execution, namely, the amount of costs, and, therefore, the execution court had jurisdiction to order execution. The mere fact that a larger amount was included in the application of the decree-holders did not necessarily imply that the court had decided that the whole of that amount was due and recoverable only by execution.

I am of opinion that the objectors are prevented from now asking the court to reconsider the question and, holding that the buildings ought not to have been demolished, to award them damages. I would, therefore, dismiss the appeal.

DANIELS, J.—I concur both in the order dismissing the appeal and in the reasons given by my learned brother for doing so. The rulings on the subject of *res judicata* as applied to execution proceedings are not altogether consistent, and it is, in my opinion, unnecessary to express any opinion as to the decisions in *Kalyan Singh v. Jagan Prasad* (1) or *Sheo Mangal v. Musammatt Hulsa* (2). In the present case the judgement-debtors were clearly bound, if they alleged that the construction of the so-called pavement was not inconsistent with the decree, to take this objection when the decree-holders asked for its demolition. It would be contrary to all principles of justice to allow them deliberately to stand aside while the pavement was demolished by order of the court, and then, after the work was completed, to come forward and claim, as they now do, that it should be restored and they should be awarded damages.

By THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

(1) (1915) I.L.R., 37 All., 539.

(2) (1921) I.L.R., 44 All., 159.

1925

DIP
PRAKASH

v.
BOHRA
DWARKA
PRASAD.

REVISIONAL CRIMINAL.

Before Mr. Justice Daniels.

1925.
July, 15.

EMPEROR v. MEWA RAM AND OTHERS.*

Criminal Procedure Code, section 421(1)—Criminal appeal—Summary dismissal of appeal from jail in ignorance that an appeal had been filed in the same case through a mukhtar—Review—Revision.

Where a Sessions Judge, in ignorance of the fact that an appeal in the same case had been filed by a mukhtar, dismissed a criminal appeal submitted from jail, it was held that, though the Sessions Judge could not review his own order, the High Court could set it aside in revision; and it was so done.

THIS was a reference made by the Sessions Judge of Budaun. The facts which gave rise to the reference are stated in the judgement.

The parties were not represented.

DANIELS, J.—In this case the Sessions Judge of Budaun has reported that while jail appeals on behalf of four persons, Mewa Ram, Khiali Ram, Sobha Ram and Chunni Lal, were pending, a petition of appeal on behalf of the same persons' was filed through a mukhtar. The Sessions Judge was away on vacation at the time, and the latter petition of appeal, which was accompanied by an application for bail, was placed before the Sessions and Subordinate Judge of Bareilly who was receiving urgent criminal applications relating to the Budaun Judgeship at that time. Owing to some delay in the post the learned Sessions Judge decided and summarily rejected the jail appeals in ignorance that an appeal from a mukhtar in which counsel was to be heard had been presented. The learned Judge asks if he has power to set aside his own order dismissing the appeals. He has no such power, but this Court has

* Criminal Reference No. 420 of 1925.

power to do so, and in the exercise of the revisional jurisdiction of this Court I hereby set aside the orders rejecting the appeals of the four persons mentioned above, and direct the learned Judge to rehear the appeals after giving them an opportunity of appearing by counsel.

1925

EMPEROR
v.
MEWA
RAM.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

1925
July, 15.

NARAIN DAS (PLAINTIFF) v. RAM CHANDAR AND
ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 66; order XXI, rules 92 and 94—Execution of decree—Procedure appropriate to execution wrongly applied to a sale held by a receiver under the authority of the court—Suit against certified purchaser.

Neither section 66 nor order XXI of the Code of Civil Procedure have any application to a sale of partnership property in the hands of a receiver held by the receiver with the sanction of the court at a time when there existed a preliminary decree for dissolution of partnership, but no final decree had yet been made. *Golam Hossein Cassim Ariff v. Fatima Begum* (1) and *Parvathammal v. Chokkalinga Chetty* (2), referred to.

THE facts of this case were as follows :—

In a suit for dissolution of partnership and for the taking of accounts brought by one Ram Chandar, son of Kanhaiya Lal and his minor son Ragho Mal against Chhajju Mal and others, a receiver was appointed to take charge of the partnership property. A preliminary decree was then drawn up in the manner indicated by order XX, rule 15, of the Code of Civil Procedure declaring the rights of the parties and giving directions as to how the property

* First Appeal No. 284 of 1922, from a decree of Har Govind Baijal, Subordinate Judge of Muzaffarnagar at Meerut, dated the 27th of February, 1922.

(1) (1910) 16 C.W.N., 394.

(2) (1917) I.L.R., 41 Mad., 241.

1925

NARAIN
DAS
v.
RAM
CHANDAR.

was to be realized and administered. After the preliminary decree had been passed the receiver brought it to the notice of the court that there were certain debts on which interest was running up, and that it might be advisable to sell some of the partnership property and get rid of these debts. The court accordingly authorized the receiver to sell whatever property he thought necessary for this purpose. Accordingly the receiver sold, amongst other items, a shop situated in Mandavi Ghalla in the city of Meerut, and it was purchased by one Ram Chandar, son of Khem Chand. The receiver asked the court to confirm the sale, and, in a proceeding dated the 7th of December, 1914, the court passed an order, purporting to be under order XXI, rule 92(1) of the Code of Civil Procedure, confirming the sale in favour of Ram Chandar, son of Khem Chand. Later on, a certificate was issued under order XXI, rule 94, to Ram Chandar.

The present plaintiff, Lala Narain Lal *alias* Ram Dayal, then sued for the ejectment of Ram Chandar, son of Kanhaiya Lal. The plaintiff asserted that the shop had been purchased from the receiver by his own brother really on his behalf, being the guardian of the plaintiff who was then a minor. The defendant pleaded that the purchase by Ram Chandar, son of Khem Chand, had been made on his (the defendant's) behalf and insisted that this Ram Chandar should be made a party to the suit, and this was done and the suit proceeded. The defence put forward was that—a sale certificate having issued to Ram Chandar, son of Khem Chand—the suit was barred by the provisions of section 66 of the Code of Civil Procedure. The court of first instance accepted this contention and therefore dismissed the plaintiff's suit. The plaintiff appealed to the High Court, where the same point was raised.

Babu *Piari Lal Banerji*, for the appellant.

Babu *Harendra Krishna Mukerji* and Dr. *Surendra Nath Sen*, for the respondents.

The judgement of the Court (LINDSAY and KANHAIYA LAL, JJ.), after stating the facts as above, thus continued:—

We have it, therefore, that the sale to Ram Chandar, son of Khem Chand, defendant No. 2 in this suit, was a sale by a receiver which took place in the circumstances to which we have referred, and we do not see how it is possible to apply the provisions of order XXI to a sale of this kind. There certainly was no sale in execution of a decree, and it seems to us that section 66 of the Code refers to a case where there has been a sale in execution of a decree. Part II of the Code of Civil Procedure, in which section 66 is to be found, relates to execution and order XXI also relates to the execution of decrees and orders.

It has been argued before us that we ought to treat this sale as having been made in the execution of a decree because it was made under directions which were contained in the preliminary decree. We do not, however, think that that argument is sustainable. A preliminary decree is not capable of execution. Further, we do not see how it is possible to describe this sale as being a sale in execution either of a decree or order. It is not, as we have said, a sale in execution of a decree nor is it a sale in pursuance of an "order" as defined in section 2(14) of the Code of Civil Procedure. "Order" means the formal expression of any decision of a civil court which is not a decree, but when the Subordinate Judge, in the course of the proceedings in suit No. 485 of 1911, gave authority to the receiver to sell the property, he was not issuing any order in this

1925

NARAIN
DAS
RAM
CHANDAR.

1925

NARAIN
DAS
v.
RAM
CHANDAR.

sense. He was not deciding anything between the parties to the case. He was simply giving a direction to the receiver to dispose of the property for the benefit of all the parties to the suit. We are satisfied, therefore, that this sale was not carried out in pursuance of any decree or order as defined above. The learned counsel for the appellant has referred us to a case which seems to be in point, *Golam Hossein Cassim Ariff v. Fatima Begum* (1). The learned Judge in that case pointed out that a sale by a receiver was not a sale by the court but a sale under the court and that in such cases the court does not grant a sale certificate nor does it confirm the sale. The learned Judge differed from the previous decision of a single Judge of the same court to be found in *Minatoonnessa Bibee v. Khatoonnessa Bibee* (2). We may also refer to another case to be found in *Parvathammal v. Chokkalinga Chetty* (3), which supports the argument of the learned counsel for the appellant. There it was held that an order under section 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the Code of Civil Procedure. The learned Judges referred to the definition of the term "order" in section 2(14) of the Code of Civil Procedure.

We hold, therefore, that in the present suit the defence cannot be put forward that the sale certificate which was issued to Ram Chandar, defendant No. 2, is a bar to the maintenance of the present suit. The fact is that had the proper procedure been observed there would neither have been an order confirming the sale nor any certificate issued under the provisions

(1) (1910) 16 C.W.N., 394.

(2) (1894) I.L.R., 21 Calc., 479.

(3) (1917) I.L.R., 41 Mad., 241.

of order XXI, rule 94. The procedure which was adopted was out of order. We, therefore, allow the appeal, set aside the decree of the court below and send the case back to the Subordinate Judge of Muzaffarnagar for disposal on the merits. Costs here and hitherto will abide the result.

1925.

NARAIN
DAS
v.
RAM
CHANDAR.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

BAKHTAWAR (DEFENDANT) v. SUNDAR LAL AND
OTHERS (PLAINTIFFS).*

1925.
July, 21.

Act No. XVI of 1908 (Indian Registration Act), section 17(b)

—Registration—Document in form of a petition to a court reciting the fact of a previous family settlement.

Held that a document, in the form of a petition to a court of revenue which recited that the parties had already composed their differences and that the property in respect of which mutation of names was sought should be entered in the names of the parties in certain specified proportions, but which did not purport to transfer any property from one party to the other nor to create any fresh title, was not a document which required to be registered. Satrohan Lal v. Nageshwar Prasad (1) and Baldeo Singh v. Udai Singh (2), referred to.

The facts of this case were as follows:—*D*, a Hindu, died leaving his widow *S*, who succeeded to his property, and his daughter *K*. After the death of *S*, *B* applied in the revenue court for mutation of names, claiming as grandson of *D*'s brother and also as adopted son of *D*. This claim was opposed by the daughter *K*. The contestants eventually compromised their

* Second Appeal No. 1528 of 1923, from a decree of P. C. Plowden, District Judge of Meerut, dated the 28th of September, 1923, confirming a decree of Raj Rajeshwari Sahai, Subordinate Judge of Meerut, dated the 17th of February, 1923.

(1) (1916) 19 Oudh Cases, 75.

(2) (1920) I.L.R., 43 All., 1.

1925.
BAKHTAWAR
v.
SUNDAR
LAL.

disputes and an unregistered document dated the 9th of January, 1909, was presented to the revenue court, which recited that they had composed their differences and agreed and prayed that the names of *B* and *K* be entered in respect of certain specified shares, respectively. The revenue court ordered mutation of names in accordance therewith, and the parties obtained possession accordingly. Subsequently, after *K*'s death, her sons, claiming as daughter's sons of *D*, sued *B* for recovery of the share of the property in the latter's possession. *B* set up in defence the unregistered compromise deed of 1909. The court held that the document was invalid for want of registration, and decreed the suit. The lower appellate court maintained the decree. *B* appealed to the High Court.

The appeal having been laid before SULAIMAN, J., was by him referred to a Bench of two Judges in view of apparent discrepancies between some earlier rulings of the Court.

Munshi *Ambika Prasad* (with whom Dr. *N. C. Vaish*), for the appellant..

The respondents were not represented.

LINDSAY, J.—After hearing arguments in this case I am of opinion that the appellant is entitled to succeed. The whole question turns on the document, dated the 9th of January, 1909, which was presented in the revenue court. It appears that this document was presented after the death of one Musammat Surjaiti who was the widow of Dungar. When Musammat Surjaiti died, Bakhtawar, who is the grand-nephew of Dungar, seems to have applied to the revenue court claiming to be the heir and to be entitled to have mutation of all the property which had belonged to Dungar, and it further appears that he was

putting forward a title by saying that Musammat Surjaiti had adopted him to her husband Dungar.

-1925
BAKHTAWAR
v.
SUNDAR
LAL.

The claim in the revenue court was opposed by Dungar's daughter, Musammat Kamli, and on the date above mentioned we find that a petition was presented to the court which is described as *darkhast razinama*. This document recited that the two parties, namely, Bakhtawar and Musammat Kamli, had already composed their differences regarding the property and had come to an arrangement between themselves by which Musammat Kamli's name was to be entered in respect of 7 bighas 12 biswas odd whilst Bakhtawar's name was to be entered in respect of the rest of the property amounting to 7 bighas 2 biswas odd. The petition describes Bakhtawar as the adopted son of Musammat Surjaiti.

Lindsay, J.

It is not disputed that the entries have remained in this way ever since the mutation court made an order upon this petition. I am of opinion that this petition is evidence of a previously arranged family settlement arrived at between Bakhtawar and Musammat Kamli, and the true view of the transaction appears to me to be that there was no transfer by one party to the other, nor was there any creation of a fresh title. Bakhtawar was setting himself up as the adopted son whilst Musammat Kamli was opposing him in her character as daughter and heir of the deceased Dungar. It is reasonable to assume that there was a *bonâ fide* dispute between the parties which was eventually composed, each party recognizing an antecedent title in the other. In this view of the circumstances I am of opinion that there was no necessity to have this petition registered. It does not, in my opinion, purport to create, assign, limit, extinguish or declare within the meaning of these expressions as used in section 17 (b) of the Registration

1925
BAKHETAWAR
v.
SUNDAR
LAL.

Act. It is merely a recital of fact by which the court is informed that the parties have come to an arrangement. The whole question raised here has been discussed by me in a ruling which will be found in *Sat-rohan Lal v. Nageshwar Prasad* (1). I have nothing to add to or subtract from what I said on that occasion. I need only say further that this ruling was cited in a Bench decision, *Baldeo Singh v. Udai Singh* (2). I would, therefore, allow this appeal and setting aside the decrees of both the courts below dismiss the plaintiffs' suit with costs in all courts.

SULAIMAN, J.—I agree, and adhere to the four propositions laid down by me in my referring order which I was inclined to accept if the matter were wholly *res integra*.*

Appeal allowed.

* These were—

(1) That division of property by way of family settlement does not amount to a transfer by one party to the other, nor does any party to such settlement derive title through the other. The settlement merely recognizes the right of the other party and accepts it in part. Not being a transfer, gift or exchange from one party to the other, the transaction does not fall under any of the sections of the Transfer of Property Act which require registration; (2) that even in the absence of a registered document it is open to either party to the family settlement to prove that there had been a family settlement which was acted upon; (3) that if the compromise is reduced to writing then if that document is used as a document of title purporting to create or *declare* rights in immovable property worth more than Rs. 100, the deed would require registration; but (4) that if the document does not purport to be a document of title creating or declaring such rights but contains a mere recital of a previous settlement arrived at between the parties, the document may be used in evidence in proof of that previous settlement, even though not registered..

(1) (1916) 19 Oudh Cases, 75.

(2) (1920) I.L.R., 43 All., 1.

REVISIONAL CIVIL.

Before Mr. Justice Daniels.

GULAB DEI (PLAINTIFF) v. THE GREAT INDIAN
PENINSULA RAILWAY (DEFENDANT).*

1925
July, 21.

Railway—Contract to convey goods at particular rate on amount of goods consigned—Basis of calculation subsequently changed, without consignor's knowledge.

The fact that a railway company may have reserved to itself the right of re-measurement and re calculation on the arrival of the goods at their destination does not entitle it, when it has made a contract to convey goods at a particular rate on the amount of goods consigned, subsequently and without the knowledge of the consignor to alter the entire basis of calculation merely because, to suit its own convenience, it has used for the conveyance of the goods a much larger wagon than was actually necessary.

This was an application in revision against an order of the Court of Small Causes at Agra. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Dr. Kailas Nath Katju, for the applicant.

Pandit Ladli Prasad Zutshi, for the opposite party.

DANIELS, J.—The question raised in this revision is as to the correctness of an additional charge of Rs. 170 levied by the G. I. P. Railway from the applicant, Musammat Gulab Dei, on account of 315 maunds of waste paper consigned from Bombay to Agra and delivered to her at the latter place. The name of the person despatching the goods was Mangalji Ganesh. The railway receipt was made out in his own name, but was subsequently endorsed to the firm of Lachhman Das Mul Chand. It was stated in the plaint that the plaintiff, namely, the

* Civil Revision No. 73 of 1925.

1925.
GULAB DHI
v.
G. I. P.
RAILWAY.

Daniels, J.

present applicant, is the proprietor of that firm. The goods were charged at Bombay at the maund-rate of eight annas per maund applicable to waste paper under the "station-to-station rate list" given on page 111 of the G. I. P. Railway Goods Tariff, Part I-B. The rate is given under No. 264, and the commodity is described as "Paper, waste, O. R.; W/300; L." The initials "O. R." mean owner's risk; the words "W/300" mean as explained on page 80 of the Goods Tariff, Part 1-A, that the rate applies to a minimum wagon-load of 300 maunds per 4-wheeled wagon, and a larger minimum, 450 or 600 maunds per 6-wheeled or bogie wagon. If the amount loaded in the wagon is larger than the minimum, freight is to be paid on the actual weight. "L" indicates that the loading was to be done by the consignor. The railway company put a wagon at the consignor's disposal for loading the goods and granted him a rail receipt showing that the waste paper was charged on the full amount of 315 maunds at the maund-rate of eight annas. Rs. 157 at this rate was paid by the consignor in advance before the receipt was issued. On arrival at Agra the railway claimed that owing to the goods having been loaded in an 8-wheeled bogie wagon, they were entitled under rule 52-A to charge, not for 315 maunds actually consigned, but for a consignment of 40 tons or nearly 700 maunds at the same rate. They, therefore, demanded from the recipient the sum of Rs. 170 which is now in dispute and refused to deliver the goods until that sum was paid.

I am not prepared to accept the interpretation of this rule which the learned Subordinate Judge has adopted. It is quite true that the railway company reserve to themselves a right of re-measurement and re-calculation on the arrival of the goods at their

destination, but this does not entitle them, when they have made a contract with the plaintiff to convey his goods at a particular rate on the amount consigned, subsequently and without his knowledge to alter the entire basis of calculation merely because to suit their own convenience they have used for the conveyance of the goods a much larger wagon than was actually necessary. It is perfectly clear that the consignor would never have agreed to consign the goods in this form if he had been told beforehand that he was going to be charged on considerably more than double the amount of waste paper he wished to despatch. I, therefore, find that the railway company were not entitled to make the additional charge which they did make in this case, and that the plaintiff's claim was well-founded.

1925.
GULAB DEI
G. I. P.
RAILWAY.

An objection has been taken on behalf of the respondents that in their written statement the railway company challenged the right of the plaintiff to sue, and that no finding has been arrived at on this point. The plea was certainly taken in the written statement, but when the case came to trial no issue was framed upon it. The sole issue which was framed was whether the plaintiff was entitled to a refund of the overcharge. Under these circumstances it must be taken that the point was not pressed at the trial.

For the reasons already given I allow this revision and decree the plaintiff's suit with costs.

Revision allowed.

REVISIONAL CRIMINAL

1925.
July, 23.

Before Mr. Justice Ashworth.

EMPEROR *v.* PANNA LAL AND OTHERS.*

Act No. III of 1867 (Public Gambling Act), section 13—Act (Local) No. I of 1917 (U. P. Gambling (Amendment) Act), section 6—Gambling—“Game of mere skill”—Playing of marbles on a public road.

The playing, in a public place, of a game of mere skill, into which chance does not enter, is not within the purview of section 13 of Act No. III of 1867 as amended by Local Act No. I of 1917, even though it may be accompanied by wagering or betting.

This was a reference made by the Sessions Judge of Aligarh in a case in which the applicants in revision before him had been convicted of offences under section 13 of the Public Gambling Act, 1867. Actually, the accused had been playing marbles for pice on a public road at Mursan. The magistrate who convicted them was of opinion that marbles was not a game of mere skill. The Sessions Judge, however, did not accept this view and recommended that the convictions and sentences should be set aside.

Babu *Surendra Nath Gupta*, for the applicants.
The Crown was not represented.

ASHWORTH, J.—This is a reference by the District Judge of Aligarh recommending that the conviction of six persons under section 13 of the Public Gambling Act (III of 1867) should be set aside in revision.

The finding was that the accused persons were playing a game with marbles on a public road, the game being one of mere skill into which chance did not enter. It is not disputed that before the amendment of the said Act by U. P. Gambling (Amendment) Act I of 1917 the conviction would have been

* Criminal Reference No. 392 of 1925.

in order. That Act, however, has added a section that nothing in the Gambling Act shall apply to any game of mere skill *wherever played*. The result of this amendment appears to be as follows. The playing of a game of mere skill in a public place is gaming but it is not such gaming as falls within the ambit of the Public Gambling Act. The Magistrate's suggestion that the expression "any game of mere skill" means a game in respect of which there is no wagering or betting, is untenable. Accordingly the convictions of the six persons in this case are set aside and the fines, if paid, will be returned to them.

Convictions set aside.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BACHAN SINGH AND OTHERS (PLAINTIFFS) *v.* BIJAI SINGH AND OTHERS (DEFENDANTS).*

1925.
EMPEROR
v.
PANNA
LAL.

1925.
July, 24.

Pre-emption—Lis pendens—Application of the doctrine of lis pendens to a suit for pre-emption.

Two suits for pre-emption of the same property were filed by rival pre-emptors having equal claims, and on the date of the filing of the second the purchasers sold the property in suit to a person having an equal right of pre-emption with both sets of plaintiffs.

Held that, applying the doctrine of *lis pendens*, the second purchaser and the two sets of pre-emptors were *primâ facie* entitled to divide the property amongst them; but, inasmuch as both suits had been dismissed by the first court and the second set of pre-emptors had not appealed, the property was divided proportionately between the second purchaser and the first set of pre-emptors. *Bhikhi Mal v. Debi Sahai* (1), followed. *Harkeshi v. Mewa Ram* (2), dissented from.

* Second Appeal No. 1612 of 1924, from a decree of Lakshmi Narain Tandan, Subordinate Judge of Farrukhabad, dated the 24th of September, 1924, reversing a decree of Banwari Lal Mathur, Munsif of Kaimganj, dated the 26th of May, 1924.

(1) (1925) I.L.R., 47 All., 923.

(2) (1923) 72 Indian Cases, 247.

1925.

PACHAN
SINGH
v.
BIJAI
SINGH.

THIS was a second appeal arising out of a suit for pre-emption. One Charan Singh sold certain property to Bijai Singh and Chandrabas. Bijai Singh was a co-sharer in the property sold, but Chandrabas was a stranger. Two suits for pre-emption were filed within about two weeks of each other, and on the date when the second suit was filed the defendants vendees sold the property in suit to one Pokhar Singh, who himself was a person entitled equally with the two sets of pre-emptors to pre-empt the property sold by Charan Singh. The court of first instance, finding that the two sets of plaintiffs and Pokhar Singh had all equal rights of pre-emption, made a decree dividing the property in suit proportionately amongst them. On appeal this decree was reversed and both suits dismissed with the result of leaving Pokhar Singh in possession of the whole. One set of pre-emptors appealed; the other did not.

Munshi *Gulzari Lal*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ.:—After hearing the arguments in this case we have come to the conclusion that the appeal must be allowed. It is quite true that the judgement of the lower appellate court is based upon a ruling of this Court reported in *Harkeshi v. Mewa Ram* (1). There can be no doubt that on the facts that case is not distinguishable from the case now before us, but nevertheless, for the reasons we are about to give, we think it should not be followed.

[After setting out the facts, the judgement then proceeded.]

In the case of *Harkeshi v. Mewa Ram* (1), upon which the lower appellate court relies, no question

(1) (1923) 72 Indian Cases, 247.

was raised regarding the application of the doctrine of *lis pendens*. We think, however, that that doctrine must be applied to pre-emption suits as well as to any other suits. We have set this down in a ruling in *Bhikki Mal v. Debi Sahai* (1). Now it is plain that in the present case the transfer which was made to Pokhar Singh was *pendente lite* and the plaintiffs appellants before us can say that the doctrine of *lis pendens* ought to be applied in the suit which they instituted, and that any rights that they had against Pokhar Singh at the institution of the suit should not be interfered with by anything done by the original vendees of the property pending the trial of the suit.

It has been said that the plaintiffs and Pokhar Singh have equal status in the matter of claiming pre-emption and it is clear that if Pokhar Singh instead of taking a transfer of the property had brought a rival suit for pre-emption, he would have been given a share of the property in proportion to the extent of his claim along with the other plaintiffs pre-emptors.

It appears to us, therefore, that on the application of this principle the decree of the court of first instance was correct in the circumstances as they then existed. We have, however, to take notice of the fact that one set of pre-emptors has dropped out and has allowed the decree of the lower appellate court to become final. We, have, therefore, now before us only one set of four pre-emptors and the purchaser, Pokhar Singh, and applying the principles laid down above, we think that the proper decree to pass is that the plaintiffs appellants be given four-fifths of the pre-empted property on payment of Rs. 320. Pokhar Singh, who has already purchased, may retain the remaining one-fifth of the property. We allow the plaintiffs two months to deposit the sum mentioned

1925.

BACHAN
SINGH
v.
BIJAI
SINGH.

(1) (1925) I.L.R., 47 All., 923.

1925.

RAGHAN
SINGH
v.
BIJAI
SINGH.

above in the court of first instance to the credit of Pokhar Singh. If the deposit is made within the time limited, the plaintiffs' claim will be decreed to that extent and they will be entitled to four-fifths of their costs in both the courts below. If the deposit is not so made, then their suit will stand dismissed with costs to Pokhar Singh in both the courts below. As regards the costs of this Court we leave the parties to bear their own costs.

Appeal allowed.

REVISIONAL CIVIL.

1925
July, 27.

Before Mr. Justice Kanhaiya Lal.

BECHAN (DEFENDANT) v. RAGHUNATH AND OTHERS
(PLAINTIFFS)*

*Civil Procedure Code, section 152; order XX, rule 6 (1)—
Jurisdiction of trial court to amend a decree not in
accordance with the judgement—Appeal.*

The jurisdiction of the court which has passed a decree to amend it so as to bring it into accordance with the judgement does not cease upon the filing of an appeal, but continues until the appellate court has heard the appeal and decided it. *Asma Bibi v. Ahmad Husain* (1) distinguished.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Kashi Narain Malaviya*, for the applicant.

KANHAIYA LAL, J.—This is an application in revision for the discharge of an order for the amendment of a decree passed by the trial court on

* Civil Revision No. Nil of 1925.
(1) (1908) I.L.R., 30 All., 290.

the 9th of May, 1925. The trial court observes that there was a mistake in the decree which was not in accordance with the judgement and it has directed that mistake to be rectified. It is argued here that the trial court had ceased to have any jurisdiction to amend this decree or to rectify it after an appeal had been filed from that decree in the court of the District Judge. But till the District Judge hears the appeal and decides it, the decree of the trial court remains in force and it can be rectified or amended by the court which passed it. It is only when the appeal has been decided and a decree has been passed in appeal confirming, amending or reversing it, that the appellate decree operates to supersede the decree of the trial court, and it is only then that the jurisdiction of the trial court to interfere with the decree so superseded ceases. It is immaterial what has happened since the order of the trial court of the 9th May, 1925 now sought to be revised was passed. The order as passed on that date was correct and the trial court had jurisdiction to pass it. The decision in *Asma Bibi v. Ahmad Husain* (1) referred to by the learned counsel for the applicant does not apply because in that case the amendment was made after the appeal was decided. The application is, therefore, rejected. The stay order passed will be withdrawn.

1925

BECHAN

v.

RAGHUNATH.

Application rejected.

(1) (1908) I.L.R., 30 All., 290.

APPELLATE CIVIL.

1925
July. 27.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

SURAJ SINGH AND ANOTHER (PLAINTIFFS) v. PHUL

KUMARI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 109 (a) and (c)—Application for leave to appeal to His Majesty in Council—Difference between orders passed in revision and orders passed in appeal—Award—Finality of decree passed on an award.

An order passed in revision is entirely distinct in its nature from an order passed in appeal, and does not come within the purview of section 109 (a) of the Code of Civil Procedure. Such an order would come within clause (c) of the section, and the High Court could grant leave to appeal if it was made to appear that the case was a fit one for appeal. But when the object of the application in revision was to upset a decree based upon an award, the High Court declined to grant leave, holding that the intention of the Legislature was to give finality to the decisions of arbitrators and the decrees founded on them, and that objections to an award on the ground of invalidity should be decided by one court alone. *Harish Chandra Acharjee v. Nawab of Moorshidabad* (1) and *Chappan v. Moidin Kultti* (2), not followed. *Lutawan v. Lachya* (3), referred to.

This was an application for leave to appeal to His Majesty in Council from an order passed by a Bench of the Court in its revisional jurisdiction whereby the Bench refused to interfere with the order of a District Judge dismissing the objections raised by one of the parties to an arbitration award and passing a decree in accordance therewith. As some of those objections were directed against the conduct of the case by the trial court, the objections were transferred by the District Judge to his own court and disposed of by him as mentioned above.

Babu Piari Lal Banerji, for the applicants.

* Application No. 25 of 1925, for leave to appeal to His Majesty in Council.

(1) (1911) 13 C.L.J., 688.

(2) (1898) I.L.R., 22 Mad., 68.

(3) (1913) I.L.R., 36 All., 69.

Sir *Tej Bahadur Sapru* and Dr. *Kailas Nath Katju*, for the opposite parties.

LINDSAY and KANHAIYA LAL, JJ.:—We have decided, after hearing arguments of counsel in this case, to refuse this application for leave to appeal to His Majesty in Council.

The order which it is sought to take in appeal is an order which was passed by this Bench in Civil Revision No. 125 of 1923. In other words, it was an order passed under the provisions of section 115 of the Code of Civil Procedure. The matter came before this Court in connexion with an arbitration award. The award having been attacked in the trial court was accepted by the learned Judge of the court below, and we decided by our order that there was no case for interference in revision. We, therefore, allowed the order of the District Judge to remain as it was.

A preliminary objection has been raised before us and it is argued in this connexion that having regard to the language of section 109 of the Code of Civil Procedure, clause (a), the applicants have no right to apply for leave to appeal to His Majesty in Council. This argument is based on the consideration that the order which was passed by this Bench, and which is the order complained of was not an order passed "on appeal" by a High Court. We agree with the argument and we do not think that an order which has been passed by this Court in the exercise of its revisional jurisdiction is an order passed "on appeal". We understand there is authority for the contrary view in a case reported in *Harish Chandra Acharjee v. Nawab of Moorshidabad* (1). The view there taken followed the view which was adopted by the Madras Court in *Chappan v. Moidin Kutti* (2). This latter was a case in which the matter under

1925

SUBRAJ
SINGHv.
PHUL
KUMARI.

(1) (1911) 13 C.L.J., 688.

(2) (1898) I.L.R., 22 Mad., 68.

1925

SURAJ
SINGH
v.
PHUL
KUMARI.

discussion was the right of appeal under the Letters Patent.

We are not prepared to take the view that an order passed by this Court in the exercise of its revisional jurisdiction is an order passed "on appeal". There is a substantial difference between the powers of this Court when exercised in appeal and when exercised in revisional jurisdiction. As was very properly pointed out, the jurisdiction of this Court under section 115 is a discretional jurisdiction and the Court is not bound to interfere even if it is satisfied that an error of law has been committed by the court below. It would be otherwise in a case which came before this Court "on appeal". We are, therefore, of opinion that this application does not lie under section 109 (a). On the other hand, it is argued that if it does not lie under clause (a) it does lie under clause (c), which provides that an appeal would lie to His Majesty in Council "from any decree or order when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council." We are of opinion that the application could be entertained under this clause if it was made to appear that the case is a fit one for appeal. It was argued before us that in the present case, as in the case of *Saadatmand Khan v. Phul Kuar* (1), the application for a certificate ought to be made to the court which passed the decree. We do not think this is so, and it may also be mentioned that in the case of *Saadatmand Khan v. Phul Kuar* (1) the matter never came before the High Court at all. There was no order by the High Court in that case.

We are left then to consider whether this application ought to be granted on the ground that the case is one to be certified as a fit one for appeal to His Majesty in Council. It is argued by Mr. *Piari Lal*

(1) (1898) I.L.R., 20 All., 412

1925

SURAJ
SINGH
v.
PHUL
KUMARI.

Banerji, who appears on behalf of the applicants, that a substantial question of law is raised and one of general importance. The argument is put in this way. It is said that it would be a great hardship on litigants who engage in arbitration proceedings if they were deprived of the opportunity of showing by means of an appeal that what purported to be an award was not an award at all. We think instead (and the law is so settled in this Court) that under the present Code of Civil Procedure the policy of the law is to make all decisions in arbitration cases final. We may refer in this connexion to the Full Bench decision of this Court in *Lutawan v. Lachya* (1) and to the observations of the learned CHIEF JUSTICE, at page 74 of the report, where he says :—

“ It seems to me that it was the clear intention of the legislature by this amendment of the Code that objections to the award on the ground of invalidity *from any cause whatever* should be decided by that court and by no other court.”

Similarly Mr. Justice BANERJI observes at page 75 of the report :—

“ It is manifest from the provisions of the Code of Civil Procedure that the intention of the legislature is to give finality to the decisions of arbitrators and to the decrees passed in accordance therewith ”.

We agree respectfully with these observations on the scope of the arbitration law as it now stands and we think it is impossible to say that any hardship is caused where, as at present, the law contemplates that any objection taken in respect of the validity of an award is to be determined by the court through which the reference was made. This is clear from the provisions of schedule II, paragraph I, sub-paragraph (1) (c) of the Code of Civil Procedure. When the award is returned by the arbitrator any party then has the opportunity of attacking the award in the court

(1) (1913) I.L.R., 36 All., 69.

1925

SURAJ
SINGH
v.
PHUL
KUMARI.

which made the reference and showing that it is invalid for various reasons which are specified in paragraph 15 "or otherwise". It seems to us, therefore, that this paragraph contemplates the entertaining by the first court of all possible grounds which can be urged against the validity of the award, and amongst those grounds, we conceive, is included the ground which has now been raised here, namely, that what purports to be an award is, by reason of certain events which are said to have happened prior to the reference, not an award at all.

Paragraph 16, schedule II, shows clearly that the right of appeal in the case where an award has been made is of a strictly limited nature, and it was no doubt for that reason that the Full Bench held, as we have said above, that it was the policy of the legislature to give finality to the decisions of arbitrators. We, therefore, hold that no proper case has been made out which would justify our granting the certificate asked for, and we accordingly dismiss this application with costs.

Application dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Kanhaiya Lal.

EMPEROR v. RAM SARUP.*

1925
August, 31.

Act (Local) No. II of 1916 (U. P. Municipalities Act), sections 178, 185, 186, 307—Municipal Board—Prosecution for building otherwise than in accordance with sanction granted—Sanction not specifying details as to manner in which construction permitted was to be built.

Sanction was given by a municipal board to one RS to make an extension to a *chabutra* belonging to him, but the

* Criminal Revision No. 453 of 1925, from an order of G. C. Badhwar, Sessions Judge of Aligarh, dated the 2nd of June, 1925.

sanction did not specify anything as to the details of construction, e.g., whether the proposed addition was to be supported on brackets or pillars or earth, and in this case brackets were used. *RS* was ordered to remove the brackets, but refused to do so and was prosecuted. *Held* that *RS* had incurred no liability under section 307 of the United Provinces Municipalities Act, 1916.

1925

EMPEROR
v.
RAM SARUP.

THIS was an application in revision against a conviction and sentence under section 307 of the United Provinces Municipalities Act, 1916. The facts of the case sufficiently appear from the judgement of the Court.

Maulvi *Muhammad Abdul Aziz* for the applicant.

The Assistant Government Advocate (*Dr. M. Waliullah*) for the Crown.

KANHAIYA LAL, J.—The applicant, Ram Sarup, applied to the Municipal Board of Hathras to extend his *chabutra* by two feet in an almost triangular line so as to make the new *chabutra* and the old *chabutra* form a rectangle. He also mentioned that he may be granted permission to put a stone on the drain to serve as a step for getting on to the *chabutra*. The map attached to the application explains the position and the form in which the new *chabutra* was to be built. This sanction was granted. At the time the application for sanction was made, it was not mentioned that the new *chabutra* would rest on stone brackets. The applicant is now being prosecuted for having put up stone brackets to support the new *chabutra*, for the construction of which the Municipality had already granted its sanction. A *chabutra* can only rest on earth or on brackets, and as the sanction did not limit the discretion of Ram Sarup to build it in any particular form, it was open to him to erect stone brackets for supporting the new *chabutra*.

1925
EMPEROR
v.
RAM SARUP.

The prosecution is wholly unjustified. The construction of the *chabutra* was made with the sanction of the Municipal Board obtained under section 178 of the United Provinces Municipalities Act, II of 1916, and a separate sanction for the erection of stone brackets to support the *chabutra* was not needed. The Municipal Board issued a notice under section 186 requiring Ram Sarup to stop the erection of the stone brackets but he refused to stop the erection. The trying Magistrate and the learned Sessions Judge were of opinion that by refusing to stop the erection of the stone brackets he had incurred a liability under section 307 of the Act; but section 186 read with section 185 refers to the construction made either in contravention of the requirements of section 178, or in contravention of the written directions given by the Board under section 118 or any bye-law. There is no bye-law pointed out to us in this case and there is nothing in the sanction to forbid the use of stone brackets as supports for the *chabutra*. The learned Sessions Judge also observes that Ram Sarup had extended his *chabutra* beyond the size sanctioned by the Board by six inches, but there is no mention of any such extension in the notice issued to him by the Municipal Board, nor was that one of the grounds taken by the Municipal Board in the trial court. In fact the contention of Ram Sarup is that his *chabutra* does not extend beyond two feet anywhere, and that matter not having been a part of the original complaint, it cannot be tried here. The application is allowed and the conviction and sentence passed on the applicant are set aside. The fine, if realized, will be refunded.

Application allowed; conviction quashed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice and
Mr. Justice Lindsay.

1925
October, 23.

ABDULLAH (DEFENDANT) v. BADR-UL-ISLAM
(PLAINTIFF).*

*Wajib-ul-arz—Construction of document—Landlord and tenant
—Right of transfer of houses—"Pukhta house".*

Held, on a construction of the provisions of a *wajib-ul-arz* dealing with the rights of tenants regarding transfer of houses, that the adjective "*pukhta*" was not necessarily confined to houses made of kiln-baked bricks, but would include a substantially-built house made of sun-dried bricks.

THE facts of this case were as follows :—

In the year 1910 a bania residing in the town of Jahangirpur in the Bulandshahr district sold to the defendant a house described as a "*dukan kham*" or *kachcha* shop. Some years afterwards the zamindar sued the purchaser under the provisions of the *wajib-ul-arz* for ejectment of the purchaser, for demolition of the shop and for clearance of the site.

According to the *wajib-ul-arz*, upon which the plaintiff founded his suit, the inhabitants of the town of Jahangirpur were divided into two classes, the first consisting of persons who were described as "*qaum sharif*" or respectable classes, and the second consisting of agriculturists and others. Persons of the first class had a right to transfer "*pukhta*" houses which they have built at their own expense." The right of transfer was expressed to be a right to transfer the houses as they stood. And it was expressly stated that the zamindars of the village had no right whatever to interfere with this privilege of people who belonged to the "*sharif qaum*". In the case of the ordinary "*riaya*" and lower classes inhabiting the town it

1925

ABDULLAH
v.
BADR-UL-
ISLAM.

was provided that they had no right to transfer their houses although they might sell the materials thereof. Neither class of resident had any right to transfer the sites of their houses.

The first court decreed the plaintiff's claim.

The lower appellate court reversed this decision and dismissed the suit, being of opinion that the defendant's vendor belonged to the privileged class and had a right to sell the house. The plaintiff appealed to the High Court and his appeal was decreed. The defendant then preferred the present appeal under section 10 of the Letters Patent.

Maulvi *Muhammād Abdul Aziz* for the appellant.

Maulvi *Iqbal Ahmād* and Maulvi *Mukhtar Ahmad* for the respondent.

The judgement of the Court (MEARS, C. J., and LINDSAY, J., after setting forth the facts as above, thus proceeded :—

It has been argued before us that the learned Judge of this Court has placed too narrow an interpretation upon the language of the *wajib-ul-arz*. He has, it seems, definitely laid down that the power of transfer which is vested in members of the respectable class in this town is limited to cases in which the houses being transferred are what is properly known as *pacca* houses, that is to say, houses which have been built of kiln-dried bricks.

In the present case it is proved that the building is not a building which has been built of what is ordinarily known as *pacca* bricks. It is a building which has been constructed with sun-dried or *kachcha* bricks. In spite of this, however, the first appellate court held that the terms of the *wajib-ul-arz* applied to this building on the ground that it was a building

of a substantial character. The Subordinate Judge thought that the expression "*pukhta*" did not necessarily imply that houses to which the term was applied were houses built of kiln-dried bricks.

1925

ABDULLAH

v.

BADR-UL-
ISLAM.

He also referred to the evidence on the record to show that a considerable number of transfers of buildings of this description had taken place without the right of transfer being questioned by the landlord. He was undoubtedly entitled to refer to this evidence for the purpose of showing the sense in which the expression "*pukhta*" is used in this town of Jahan-girpur.

It appears to us, after listening to the arguments of the learned counsel, that the learned Judge of this Court has placed too narrow a construction on the expression "*pukhta*," and we think that the better sense was arrived at by the first appellate court.

Taking the language as it stands in the context, we are of opinion that the interpretation adopted by the first court of appeal is more appropriate than that which found favour with the learned Judge of this Court. In the circumstances, therefore, we are of opinion that this appeal ought to be allowed, that the decree of the learned Judge of this Court should be discharged and that the decree of the first appellate court should be restored. We direct accordingly and also direct that the appellant do get all his costs in this Court.

Appeal allowed.

APPELLATE CRIMINAL.

1925
November,
6.

Before Mr. Justice Mukerji.

EMPEROR *v.* FAUJDAR MAHTO AND ANOTHER.*

Criminal Procedure Code, sections 233, 234 and 235—Misjoinder of charges—Accused charged at the same trial with separate offences of kidnapping and cheating in respect of two different persons.

Two girls were kidnapped by accused on different dates and were passed off as Chattri girls on one *BR*, who wanted a wife for himself and a wife for his brother, and who paid money to the accused for them. *Held* that, although section 234 of the Criminal Procedure Code would allow the trial of the two cases of kidnapping together and similarly section 235 would allow the trial of the offence of kidnapping with respect to one girl and cheating with respect to the same girl together, yet the operation of the two sections could not be combined and it was impossible to combine all the four charges—two of kidnapping and two of cheating—in one trial. *Emperor v. Shuja-ud-din Ahmad* (1) and *Emperor v. Sheo Saran Lal* (2), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgement.

Mr. *L. M. Roy* and *Munshi Kamla Kant Varma*, from the judgement.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

MUKERJI, J.:—The first point argued in this appeal is that there is a misjoinder of charges and the whole trial is vitiated by illegality.

It appears to me that this argument is well-founded and must be given effect to, although the point was not taken specifically in the memorandum of appeal.

* Criminal Appeal No./668 of 1925, from an order of Ali Ausat, Sessions Judge of Ghazipur, dated the 29th of July, 1925.

(1) (1922) I.L.R., 44 All., 540.

(2) (1910) I.L.R., 32 All., 219.

1925

EMPEROR
S.
FAUJIDAR
MAHIG.

Briefly, the alleged facts are these. Two girls were kidnapped on different dates and they were passed off as Chattri girls on receipt of money from one Bishan Rai who wanted a wife for himself and a wife for his brother. It is argued that the offences of kidnapping being separate offences, the trial ordinarily ought to have been separate, under section 233 of the Code of Criminal Procedure. There can be no doubt that this is correct, provided the case does not come within sections 234, 235, 236 and 239. Section 234 of the Code of Criminal Procedure says that where more offences than one, but of the same kind, are committed within the space of 12 months, the offender can be tried for all the offences, provided they do not exceed three in number, in the same trial. Section 235 lays down that where in one series of facts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried for every such offence. Section 234 would allow the trial of two cases of kidnapping together. Similarly section 235 would allow the trial of the offence of kidnapping with respect to one girl and cheating with respect to the same girl in one trial. Sections 236 and 239 have no application to the facts of this case. The question now is whether sections 234 and 235 allow a combination of charges so that there may be one joint trial in respect of one kidnapping and cheating as a part of the same transaction with another and independent offence of kidnapping together with cheating with respect to the girl kidnapped, as a part of the same transaction. Even if there were no authority for the proposition, I would have had no hesitation in coming to the conclusion that the operations of the two sections 234 and 235 cannot be combined. The reasons are obvious. If this were permitted the whole

1925
EMPEROR
v.
FAUJIDAR
MAHTO.

object of the rule laid down in section 233 would have been frustrated. The main principle is that there should be a separate trial for every distinct offence. Two exceptions are allowed (so far as the facts of this case are concerned) *viz.*, those enacted in sections 234 and 235. The present case in its entirety does not come under section 234, nor does it come in its entirety within section 235. If we permit a joint trial in respect of two sets of separate and independent transactions in which different offences have been committed, we would create such an amount of confusion as would in most cases end in a distraction of the minds of the judges and jury and the accused persons themselves.

This case is much stronger than the cases of *Emperor v. Shuja-ud-din Ahmad* (1) and *Emperor v. Sheo Saran Lal* (2) quoted by the learned counsel for the appellants as authority.

The result is that I accept the appeal, set aside the convictions and the sentences and order a retrial of the case or cases by the learned Sessions Judge after proper joinder of charges.

A question of jurisdiction was also argued before me. It was pointed out that the two offences of kidnapping really took place within the jurisdiction of some court in the province of Bihar and Orissa. This is a matter which should also be looked into by the learned Sessions Judge at the fresh trial.

Appeal allowed.

(1) (1922) I.L.R., 44 All., 540.

(2) (1910) I.L.R., 32 All., 219.

REVISIONAL CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

GOPAL DAS (DEFENDANT) *v.* BAIJ NATH AND OTHERS
(PLAINTIFFS) AND SHEO PRASAD AND ANOTHER
(DEFENDANTS).*

1925
November,
16.

*Civil Procedure Code, order XXX, rule 1, sub-clause (2)—
Suit against partnership—Reference to arbitration entered
into by one partner alone—Award and decree in accordance
—Application in revision by non-assenting partner.*

One partner in a firm against which a suit is pending is not entitled, unless under a deed of authority, to enter into an agreement to refer the matters in dispute to arbitration so as to bind the other partner or partners who have not agreed to or joined in the application to refer. *Umed Singh v. Seth Sobhag Mal Dhadha* (1) and *Ishar Das v. Keshab Deo* (2), referred to. In such a case it is open to a partner who has not agreed to the reference to challenge in revision the award and the decree based thereon upon the ground that the reference was in its inception illegal. *Ajudhia Prasad v. Badar-ul Husain* (3) and *Kanhya Lal v. Jagannath Pershad, Hanuman Pershad* (4), referred to.

THIS was an application in revision against an order disallowing certain objections to an award and directing that a decree be prepared in terms of the award. The facts were as follows:—

A suit was instituted by the plaintiffs against a firm named Gobind Prasad, Makund Ram which has two partners, Gopal Das and Sheo Prasad, father and son. In the plaint the plaintiffs expressly asked that notices should be served on the two partners named individually. The notices were ordered to be issued to them separately. Only Sheo Prasad filed a written statement and engaged a vakil and in the vakalatnama

* Civil Revision No. 69 of 1925.

(1) (1915) I.L.R., 43 Calc., 290. (2) (1910) I.L.R., 32 All., 657.
(3) (1917) I.L.R., 39 All., 489. (4) (1920) 19 A.L.J., 33.

1925
GOPAL DAS v. BALI NATH. he purported to engage the vakil as a partner of the firm. Gopal Das did not put in any appearance in the court of the Subordinate Judge. Before the evidence commenced, one of the plaintiffs and the vakil for all the plaintiffs as well as Sheo Prasad signed an application referring the dispute between the parties to a named arbitrator. In this application Gopal Das did not join. The matter was referred to the arbitrator and an award was made against the defendant. Objections were filed both by Sheo Prasad and Gopal Das to the validity of the award, but they were overruled. Gopal Das then applied in revision to the High Court.

Pandit *Rama Kant Malaviya* and Pandit *Kashi Narain Malaviya*, for the applicant.

Dr. *Kailas Nath Katju*, for the opposite parties.

SULAIMAN, J. :—A preliminary objection is taken on behalf of the respondents that, no matter whether the decision of the court below was right or wrong as to the objections raised before it, the order is not open to revision by this Court. Where objections are raised as to the proceedings before an arbitrator and they are the subject of a decision by the trial court, it cannot be suggested that there has been any irregularity committed by the court in the exercise of its jurisdiction. Such objections, therefore, cannot be properly raised again in revision. But where the applicant challenges the proceedings of the court itself and attacks the reference made by the court to the arbitrator, it is not merely a question of a wrong decision by the court but may be one of irregularity or illegality committed by it in the exercise of its jurisdiction. The learned counsel has relied on the case of *Ajudhia Prasad v. Badar-ul-Husain* (1) where a learned Judge of this Court did observe that objections as to the validity of

(1) (1917) I.L.R., 39 All., 489.

a reference ought to be raised under rule 15 of schedule II of the Code. But in the case of *Kanhya Lal* ¹⁹²⁵ ^{GOPAL DAS} ^{v.} ^{BAIJ NATH.} *Jagannath Pershad, Hanuman Pershad* (1) decided by a Bench of which the same learned Judge was a member, it was remarked that an objection as to the validity of a reference to arbitration was not an objection within the meaning of rule 15 and had no finality attached to it. With this last observation we agree. The objection is not as to the validity of the award only, but as to the illegality of the reference to the arbitration. This reference having been made by an order of the court, it is open to revision after the case has terminated. It would not have been possible for the applicant to come up in revision from an interlocutory order. We accordingly overrule this preliminary objection.

Sulaiman,
J.

[After stating the facts as above, the judgement continued:]

There can be no doubt that under schedule II, rule 1, it is imperative that all parties *interested* should agree that any matter in difference between them be referred to arbitration. Of course it is not now necessary that *pro formâ* defendants must also join, nor is it necessary that persons who are not interested in the matter in difference between those joining in the reference should be impleaded. But, all the same, it is necessary that all persons who are interested in the matter which is in difference between the parties and which is going to be referred to arbitration, should join. Although it is not absolutely necessary that they should all sign the application made to the court, it is necessary that they should agree to the reference. The learned advocate for the respondents has relied on the provisions of order XXX, rule 1, sub-clause (2)

1925
 GOPAL DAS
 v.
 LAIT NATH.
 Sulaiman,
 J.

under which, when a suit is brought against a firm, in the case of any pleading or other document required by or under the Code to be signed, verified or certified by the plaintiff or the defendant it is sufficient if such pleading or other document is signed, verified or certified by one of the partners. It may, however, be noted at once that under no provision of the Code is an agreement or application to the court required to be signed, verified or certified by a party. All that schedule II, rule 1, sub-clause (2) requires is that an application to the court should be in writing. It does not require that it should be signed by the party. From the case of *Umed Singh v. Seth Sobhag Mal Dhadha* (1) it is clear that the agreement need not be in writing; it may be oral. Thus order XXX, rule 1, sub-clause (2) does not empower one partner to refer the case to arbitration so as to bind the other partners who have not agreed to or joined in the application for reference. It may be pointed out that once a decree has been passed against a firm it can be executed under order XXI, rule 50, not only against the property of the partnership but also against any person who has appeared as a partner or who has been individually served as a partner with a summons and has failed to appear. Thus the consequences of a decree passed against a firm are to make the partners who have been served individually liable.

I, therefore, think that it could never have been in the contemplation of the legislature to make an agreement for reference to arbitration by only one of the partners binding on all the partners merely because the suit is against the firm as such.

Reliance has been placed on the case of *Ishar Das v. Keshab Deo* (2) where it was held that a minor defendant, whose guardian *ad litem* did not put in an

(1) (1915) I.L.R., 43 Cal., 290. (2) (1910) I.L.R., 32 All., 657.

appearance in the case nor contested the suit, was not a person interested in the matters which were referred to arbitration and that therefore his not joining in the reference did not invalidate it. It may be that the learned Judges on the facts came to the conclusion that the matter referred to arbitration did not affect the interest of the minor at all. We are not prepared to hold that if a defendant is interested in the subject-matter of the reference and does not join in the reference, he is bound by the award merely because he did not choose to put in an appearance and contest the suit. In the present case, as already remarked, Gopal Das was directly interested in the subject-matter of the reference.

1925
GOPAL DAS
v.
BALJ NATH.

I am accordingly of opinion that there is nothing in the Civil Procedure Code which entitles Sheo Prasad as one of the partners to refer the entire dispute to arbitration without the agreement of the other partner Gopal Das.

* * * * *

I would accordingly allow this revision and setting aside the order of reference (with which the award and the decree fall to the ground), direct that the case be restored to its original file and disposed of according to law.

MUKERJI, J.—I agree. I wish to add just a few words to emphasize my view that when a reference is made to arbitration in a suit in which a firm is a party, all the members of the firm who are sought to be bound must join in making the reference. The object of enacting order XXX of the Civil Procedure Code of 1908 was not to give any one of the members of the partnership any higher authority than he possessed under the law before the enactment. For brevity of reference, it was sometimes expedient to

1925
GOPAL DAS v. BATI NATH
describe certain partners merely by the name of the firm. A firm is not a corporation and has got no entity apart from the entities which constitute the firm. In order to establish the proposition that one of the members of a partnership business could refer a dispute to arbitration on behalf of all the members of the partnership, something more than the rules enacted in order XXX of the Civil Procedure Code should be pointed out. It will be noticed that in rule 2 of order XXX, a defendant may at any time call upon the plaintiffs, who are suing under the name of their firm, to disclose the identity of the partners who constitute the firm. If they fail to disclose their names, the proceedings must be stopped. This shows that the legislature meant that, where necessary, all the individuals who constitute the plaintiff or the defendant firm must come before the court under their original names and descriptions. This is an additional reason for holding that a partner is not entitled, except under a deed of authority, to refer a matter to arbitration so as to bind all his partners.

By THE COURT.—The revision is allowed, the award and the decree are set aside and the case be restored to the original file and be disposed of according to law. As Gopal Das is partly to be blamed, we direct that the costs should abide the event.

Revision allowed.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

1925
November,
11.

BINDA PRASAD AND ANOTHER (JUDGEMENT-DEBTORS) v.

RAJ BALLABH SAHAI (DECREE-HOLDER).*

Civil Procedure Code, sections 50, 52 and 53—Hindu law—Joint Hindu family—Decree against father—Execution sought against sons, the father being dead, but the grandfather having survived him.

The question whether property in the hands of the sons in a joint Hindu family is liable to attachment and sale in execution of a decree against their father as being property of the father which had come to the sons as his legal representatives, is a question which must be decided with reference to the circumstances at the date of the father's death. Where, therefore, a decree was had against the father and he died before any property was attached, leaving his own father and four sons surviving, and subsequently the grandfather died, it was held that the decree-holder could not in these circumstances take out execution against the property in the hands of the sons.

THE facts of this case were as follows :—

One Tapesbri Dayal, the father of the appellants, borrowed some money from the decree-holder, respondent, on a promissory note in 1914. On the basis of that promissory note a decree was obtained against him on the 28th of February, 1916. Before any property of his was attached, Tapesbri Dayal died. On his death he left his father, Bihari Lal, and four sons, the two appellants and two minor brothers of theirs. In 1919 an application for execution of the decree was made against the sons alone. The two minor sons filed objections on the 5th of August, 1919, denying their liability to pay the amount due under the decree. Bihari Lal also filed

* Second Appeal No. 1468 of 1924, from a decree of Zorawar Singh, Additional Subordinate Judge of Ghazipur, dated the 21st of July, 1924, reversing a decree of Lakshmi Dat Joshi, Munsif of Rasra, dated the 23rd of December, 1922.

1925

BINDA
PRASAD
v.
RAJ
BALLABH
SAHAI.

separate objections. By an order, dated the 2nd of September, 1919, the objections of the two sons were disallowed. By a subsequent order, dated the 11th of December, 1919, the objection of Bihari Lal was allowed with respect to the house which had been attached but was disallowed with respect to certain mortgagee rights. Subsequently Bihari Lal also died. The decree-holder has now applied for recovery of the balance of the decretal amount by execution against the sons of Tapesbri Dayal by attaching a new item of property. The sons again filed objections urging that the property was not liable to pay the amount. The court of first instance allowed their objections, but, on appeal, their objections have been disallowed and execution ordered to proceed, hence this second appeal.

The appeal came originally before SULAIMAN, J., and was referred by him to a Bench of two Judges.

Munshi *Shiva Prasad Sinha*, for the appellants.

Pandit *Shiam Krishna Dar* and Munshi *Baleshwari Prasad*, for the respondent.

The judgement of SULAIMAN, J., after setting forth the facts as above, thus proceeded :—

It cannot be doubted that under the rulings which were in force under the old Code of Civil Procedure a decree-holder who had obtained a money decree against a member of a joint Hindu family had no remedy in the execution department against the sons of the deceased. Under certain circumstances it was laid down that his remedy was by a separate suit. But I am not aware of any case in which a separate suit was maintained when the deceased left not only sons and grandsons but also father uncle, brother or nephews. However that may be, the decree-holder had no remedy in the execution department under the old Code. The provisions of section 53 have now been

added which, under certain circumstances, make the sons of the deceased liable to pay the debt. It is obvious that unless the respondent can come within the four corners of section 53 which is a new enactment, he has no remedy on the execution side. Section 50, sub-clause (2), provides that the legal representative of a deceased person is liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. Section 52 says that the decree is to be executed by attachment and sale of the property of the deceased person. Now, ordinarily a member of a joint Hindu family holds joint property in his own right which he acquired at his birth and does not inherit it from the deceased coparcener in the strict sense of the word. But section 53 provides that for the purposes of sections 50 and 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of debts of a deceased ancestor in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative. It is clear to my mind that in order to see whether a certain person is the legal representative of the deceased with regard to the property sought to be attached, the crucial date is the date of the death of the deceased and not the date of attachment of that property. If on the date when the deceased died it cannot be said that a certain property came into the hands of the son or other descendant as his legal representatives, section 52 will not be applicable. In the present case on the date when Tapesbri Dayal died Bihari Lal was alive. Bihari Lal not not a son or other descendant. He was in fact the father of the deceased. Under the Hindu law there was no pious obligation on Bihari Lal to pay his son's debt. The joint family of which Bihari

1925

BINDA
PRASAD
v.
RAJ
BALLABH
SAHAY.

Sulaiman
J.

1925

BINDA
PRASAD
v.
RAJ
BALLABH
SAHAI.

Lal was a member was also therefore not liable to discharge the debt. The property belonging to the family was, therefore, on the death of Tapesbri Dayal not one which was liable under the Hindu law for the payment of the debt of the deceased. It cannot, therefore, be disputed that between the years 1916 and 1919, when Bihari Lal was alive, the decree holder could not possibly proceed against the joint family property on the ground that it was liable to pay the debt of the deceased.

The learned vakil for the respondent has argued before us that at the time when the attachment was being made, there were no other members of the family but the sons, and possibly grandsons, of the deceased Tapesbri Dayal. It is said that therefore the property now in the hands of a son or other descendant is liable under the Hindu law for payment of the debt of the deceased father. If the crucial date to be considered is the date of the death of the deceased, then this argument obviously has no force. If the property was not liable before, it cannot now become liable merely because the grandfather has died since. I am, therefore, of opinion that the decree-holder is not entitled to proceed against this property and treat it as part of the assets of the deceased which has come into the hands of the sons and grandsons.

MUKERJI, J.—Having regard to the able arguments that have been addressed on both sides in this case I have thought it necessary to say a few words, although I am generally in agreement with what has fallen from my learned brother.

Two points have been discussed. One is whether the appellants as Hindu sons are liable to pay out of the joint family property the debt of their father, and, secondly, whether a previous order passed in the

execution department, dated the 2nd of September, 1919, operates as *res judicata*.

[After stating the facts, the judgement continued:]

The first question to be considered is whether this property is liable to be attached in execution of Tapesbri Dayal's decree.

Section 53 of the Code of Civil Procedure is, by consent, the only provision to which we must refer to find the answer. Section 53 lays down who would be regarded as the legal representatives and what property would be regarded as the assets of a deceased judgement-debtor, in certain circumstances. But to read and understand section 53 it would be necessary to read sections 50 and 52 to which the section refers. Section 50 says that when a judgement-debtor dies the decree may be executed against his legal representative. Then it further says that the legal representative is liable only to the extent of the property of the deceased which has come into his hands and has not been duly disposed of. In the case of a joint Hindu family, on the death of a joint member who happens to be a debtor, there are no assets that can be followed; because the deceased's share lapses into the family by the principle of survivorship. There is, however, a proposition of Hindu law, *viz.*, the family property in the hands of a father is liable to pay his debts, notwithstanding there may be joint sons of the father. On this principle this High Court allowed only suits to be brought against sons of a deceased judgement-debtor, who happened to be a member of a joint Hindu family, if the property had not been attached in the life-time of the debtor. Some High Courts allowed the sons to be brought on the record and the family property to be pursued in their hands. To remove this anomaly section 53 was

1905

BINDA
PRASAD
v.
RAJ
BALLABH
SAHAI.

Mukerji, J.

1925

BINDA
PRASAD
C.
RAJ
BALLABH
SAHAI.

Makerji, J.

enacted. It is laid down therein that where there is a liability under the Hindu law on the sons to pay their father's debt, that liability may be enforced in execution as well. That is the meaning of section 53, as I understand it. Taking this test, we have to see whether the joint family property could be realized on the death of Tapesbri Dayal for the payment of his debts. There can be no doubt that Tapesbri Dayal could not sell the property at the time he died in order to pay off his own debts. He was not the head of the family and the property was not in his hands. The property was in his father's hands. The liability of the sons to pay their father's debt not tainted with immorality is the same whether the liability is enforced through the court or it is taken advantage of by the father in paying off his antecedent debts by private treaty. In my opinion the test is that the property which the father could sell in his life-time is the only property that could be pursued by his creditor on his death in the hands of his sons. This must be so for obvious reasons. No case has been cited to us in which it has been established that irrespective of the nature of the property sons are liable to pay. The sons, if they have any personal property, not inherited through the father, are not liable to pay a father's debt. It is, therefore, only such property as was under the control of the father in his life-time in order to pay his antecedent debts that can be followed in execution. If this be so, it is clear that the property that existed in the family on the death of Tapesbri Dayal was not so liable. It is conceded that for three years, that is to say, during the life-time of Bihari Lal, the property could not be attached. Then the question is whether the death of Bihari Lal has made any such difference in the position of the parties as to make the property, which was not attachable

before, attachable now. The sons may very well say and they do say that they got the property not from their father but from their grandfather. As a matter of Hindu law the grandsons get their property in their own right, neither through their father nor through their grandfather. But in order to adjust the conflicting rights, *viz.*, of the creditor and of the son, it is said that the property received by sons through their father is liable. In this case the property in question was received by the sons through their grandfather and not through the father. In this view we have to look to the date of the death of Tapeswari Dayal in order to see what property was liable to pay his debts. The result would be that the property now in question cannot be sold in execution.

By THE COURT.—The appeal is accordingly allowed and the decree of the lower appellate court is set aside and that of the court of first instance restored with costs throughout.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

NARAIN DAS AND OTHERS (DEFENDANTS) *v.* SHEO DIN
AND ANOTHER (PLAINTIFFS).*

1925
November,
12.

Civil Procedure Code, order XXII, rule 3, sub-clause (2)—Joint decree—Appeal—Death of one respondent—Abatement, whether as to one or both.

A suit for redemption of a mortgage was brought by two plaintiffs jointly and was decreed. The defendants appealed: but, during the pendency of the appeal, one of the plaintiffs respondents died and no steps were taken within limitation to bring his representative on the record.

Held that the appeal had abated so far as the deceased respondent was concerned, but this did not necessarily mean

* Second Appeal No. 626 of 1923, from a decree of H. J. Bell, District Judge of Jhansi, dated the 25th of January, 1923, confirming a decree of Ram Saran Das, Munsif of Jhansi, dated the 14th of October, 1922.

1925
NARAIN
DAS
v.
SHEO DIN.

its abatement so far as the surviving respondent was concerned. *Wajid Ali Khan v. Puran Singh* (1), *Shankerbhai Manoharbhai Patel v. Motilal Ramdas Shah* (2), *Imam-ud-din v. Sadarath Rai* (3), *Tej Narain Sahu v. Dal Ram Sahu* (4), *Baser Sheikh v. Fazle Karim Biswas* (5), and *Sardari Lal v. Ram Lal* (6), referred to.

THE facts of this case were as follows :—

A suit for redemption of a mortgage was brought by two plaintiffs, Sheo Din and Debi, and was decreed. Both parties appealed to the District Judge and both appeals were dismissed. The defendants appealed to the High Court but during the pendency of the appeal, one of the plaintiffs respondents died and no steps were taken to bring his representative on to the record within the prescribed time. The plaintiffs did not form members of a joint Hindu family. At the hearing of the appeal a preliminary objection was raised that the appeal had abated *in toto*.

Dr. N. C. Vaish, for the appellants.

Mr. A. Sanyal, for the respondents.

The judgement of SULAIMAN, J., after stating the facts and mentioning that a preliminary objection had been raised that the appeal abated as a whole, thus continued :—

There can be no doubt that the appeal must abate as against Sheo Din deceased and his legal heirs. The question is whether the appeal must be deemed to have abated as regards the respondent Debi also or not.

Under the old Code of Civil Procedure, no doubt in a number of cases it was held that where a joint decree has been passed and the defendant appeals against the plaintiffs but fails to implead one of them or to bring his heirs on the record within the time allowed by law, the whole appeal abated. The

(1) (1924) I.L.R., 47 All., 100.

(3) (1910) I.L.R., 32 All., 301.

(5) (1914) 19 C.W.N., 290.

(2) (1924) I.L.R., 49 Bom., 118.

(4) (1922) I.L.R., 1 Pat., 699.

(6) (1919) I.L.R., 1 Lah., 225.

words of the old section 368 were wide enough to cover this position. Under the new Code some amendments have been introduced which require consideration. In the first place, in order I, rule 9 it is specifically provided that no suit shall be defeated by reason of misjoinder or *non-joinder* of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties before it. Then in order XXII, rule 4, sub-clause (3) it is provided that if no application to bring the heir of the deceased defendant has been made in time, the suit shall abate *against the deceased defendant*. We have a similar provision in rule 3, sub-clause (2), when a plaintiff dies. These rules have been made applicable to appeals. On the face of these rules it is clear that when a respondent dies and his heir is not brought on the record within time, then the appeal abates as against the deceased.

Of course there may sometimes be cases where in the absence of one party to the case the appellate court finds itself helpless to decide the matter in controversy. Cases of this kind may arise in partition suits and suits for dissolution of partnership, where it may be said that in the absence of one of the parties jointly interested a partition or dissolution cannot be made. The same principle has been extended to pre-emption in the case of *Imam-ud-din v. Sadarath Rai* (1), which was followed with some difference of opinion in the case of *Wajid Ali Khan v. Puran Singh* (2); but the circumstances of a pre-emption suit are peculiar and do not necessarily apply to a suit for recovery of possession either on payment of money or without any such condition.

1925

NARAIN
DAS
v.
SHERO DIN.Sulaiman,
J.

(1) (1910) I.L.R., 32 All., 301.

(2) (1924) I.L.R., 47 All., 100.

1925

NARAIN
DAS
v.
SHEO DIN.

Sulaiman,
J.

When a suit for joint possession of property is brought by more than one plaintiff and a decree is obtained in the first court, it is open to the defendant to challenge the right of any one of the plaintiffs although he may not be in a position to challenge the rights of the other co-plaintiffs. It is, therefore, conceivable that he may choose to appeal only as against one of such claimants and not substantially as against the others. He may have good reason not to appeal against some, as he may have compromised the dispute with them, or it may be to his interest to get rid of some of the claimants if he cannot get rid of all. In any case, very often an appellate court may uphold the decree in favour of some of the plaintiffs and may dismiss the claim of the other plaintiffs. It, therefore, seems to me that in a case for joint possession of property brought by a number of plaintiffs, it is possible to dismiss the claim of some and uphold the decree in favour of the others. The decree is certainly a joint decree, but the rights of claimants are distinct and can be considered individually and disposed of separately. In this view of the matter, there being no express provision directing that the whole appeal should abate, it seems difficult now to hold that the present appellant cannot ask this Court to dismiss the claim of Debi even though he may not be in a position to challenge the decree in favour of the deceased Sheo Din. The only case under the present Code, where in a suit for joint possession the principle of the integrity of a joint decree has been applied, which has been brought to our notice is the case of *Tej Narain Sahu v. Dal Ram Sahu* (1). The learned Judges of the Patna High Court did not consider the effect of the amendments in the new Code but merely followed a previous ruling of the Calcutta

(1) (1922) I.L.R., 1 Pat. 699.

High Court in *Baser Sheikh v. Fazle Karim Biswas* (1). In this latter case also the amendments were not considered, but two previous cases under the old Code were simply followed. It is unnecessary to consider the case where a joint money decree has been passed in favour of several plaintiffs. A case like that arose before the Lahore High Court in *Sardari Lal v. Ram Lal* (2).

1926
NABAIN
DAS
v.
SHRO DIN

Sulaiman,
J.

Even if this appeal were allowed the result would simply be that Debi would be disentitled from executing his decree and his right thereunder would be extinguished. This may not necessarily affect Sheo Din and his heirs, who may be allowed to execute the whole decree or at any rate a part of the decree.

I would, therefore, overrule the preliminary objection. Coming to the merits of the appeal, the main point urged before us is that the lower appellate court has made out a new case for the plaintiffs in holding that the defendants are holding possession as mere licensees. The plaintiffs alleged themselves to be the original proprietors. The defendants never disputed the original title of the plaintiffs. The plaintiffs alleged that the defendants were put in possession by their predecessors as mortgagees. The defendants denied the very existence of the mortgage and set up adverse possession. The court of first instance had found the existence of title in favour of the plaintiffs and had not accepted the plea of adverse possession inasmuch as it found them to be holding possession as mortgagees.

On appeal the learned Judge has found that the mortgage is not proved. He has found that the defendants have not proved their adverse possession. He has further found that the defendants' predecessor was put in possession with the leave of the owner and

(1) (1914) 19 C.W.N., 290.

(2) (1919) I.L.R., 1 Lah., 225.

1925

NARAIN
DAS

SHEO DIN.

that there are written admissions available which destroy the plea of adverse possession. It is obvious that the decree has been upheld on the main ground that the title rests with the plaintiffs and that the defendants have not established their adverse possession. It was not really a new case set up for the first time. The appeal accordingly has no force and I would dismiss it with costs.

MUKERJI, J. :—

[The facts were stated as before.]

Before I come to consider the appeal on the merits it is necessary to dispose of the preliminary objection. My view on the question of abatement is set forth in the case of *Wajid Ali Khan v. Puran Singh* (1). In that case my opinion was not accepted by the majority of the Judges who heard the case. The decision of the case, however, was influenced by the fact that the case involved a pre-emption decree and the question now before us is whether the principle therein enunciated by the majority of the Judges who heard the appeal should be followed in this case. The majority of Judges did not say anything by which they may have meant to lay down anything like an universal rule. I, therefore, agree with my learned brother that the principle there laid down cannot be and should not be extended to a case like the present one. Here two persons who are independent of each other purchased a mortgagor's interest and instituted a suit for redemption. It would not affect Sheo Din if the suit of Debi be dismissed at the instance of the present appellants. A very similar case arose before the Bombay High Court in the case of *Shankerbhai Manoharbhai Patel v. Motilal Ramdas Shah* (2). SHAH, A. C. J., remarked :—“ It is enough for our

(1) (1924) I.L.R., 47 All., 100.

(2) (1924) I.L.R., 49 Bom., 118.

present purpose to point out that if the defendants succeed it would place them in a more advantageous position in so far as they would have then to satisfy the plaintiff No. 2 only with reference to the decree and not the plaintiff No. 1". In the case before the Bombay High Court there were two plaintiffs who were tenants-in-common and they had succeeded in their suit for ejectment. On an appeal by the defendants one of the plaintiffs died but his legal representative was not brought on the record. Then the question arose whether the whole appeal should abate or a part. Both the ACTING CHIEF JUSTICE and MR. JUSTICE FAWCETT held that the appeal ought to be heard so far as the surviving respondent was concerned. I am, therefore, of opinion that the law laid down by the majority of the Judges in the case of *Wajid Ali Khan v. Puran Singh* (1) is not of universal application and should not apply to this case. The appeal should be declared to have abated as against Sheo Din only.

1925

NARAIN
DAS
v.
SHEO DIN.

Mukerji, J.

Coming to the merits of the case, it appears to me that the appeal has no force. The case is just like those that frequently arise when an occupancy tenant mortgages his tenancy and then claims to redeem it. The mortgage is illegal. He is allowed to recover his property but on payment. In this case there was a mortgage, but there being no registered mortgage-deed, it was not operative. The title was with the plaintiffs, and the defendants came upon the property with the permission of the plaintiffs' predecessor-in-title. That being the case, the learned Judge was right in holding that the plaintiffs were entitled to succeed. The learned Judge thought that the defendants were fortunate enough to get a sum of money. But this is hardly correct. The defendants were entitled, in equity, to have the money back which they

(1) (1924) I.L.R., 47 All., 100.

1925
NARAIN
DAS
v.
SHEO DIN.

had advanced in consideration of the property. The appeal, therefore, must fail.

BY THE COURT.—We declare that the appeal, as against Sheo Din, has abated and we dismiss the rest of the appeal. The appellants must pay the costs of the respondent Debi in this Court.

REVISIONAL CRIMINAL.

1925
November,
17.

Before Mr. Justice Daniels.

LALLAN MISIR AND OTHERS v. RAM RICHCHA.*

Criminal Procedure Code, section 145—Finality of order passed—Review.

An order passed under section 145 of the Code of Criminal Procedure is a final order and it is not open either to the magistrate who passes it or to his successor to review it or to set it aside in any way.

THE facts of this case are stated in the order of the High Court.

Pandit *Ambika Prasad Pande*, for the applicants.

Mr. *A. P. Dube*, for the opposite party.

DANIELS, J. :—This is a reference by the learned Additional Sessions Judge of Gorakhpur on the ground that an order passed by the magistrate, Chaudhri Mohib-ullah, directing certain crops to be made over to the opposite party, Ram Richcha Koeri, was passed without jurisdiction and should be set aside. There was originally a proceeding under section 145 of the Code of Criminal Procedure in respect to these crops and the plots on which they grew, between Lallan Misir on the one side and Kanta Kunwar and Jamna Kunwar on the other. That

* Criminal Reference No. 484 of 1925.

proceeding was commenced before Chaudhri Mohib-ullah, but he was transferred while it was pending and the final order was passed by another magistrate. This order was to the effect that the magistrate was unable to determine who was in possession of the plots, and he therefore attached the crops under section 146 of the Code of Criminal Procedure. The crops had in the meanwhile been cut and stored by the police to prevent their perishing. Ram Richcha had applied to be made a party during the pendency of these proceedings, but his application was rejected. After the case under section 145 was decided, he made a complaint in respect of these crops before Chaudhri Mohib-ullah, who had by this time returned, under section 427 of the Indian Penal Code. This complaint was dismissed. A previous application claiming the crops and asking the court to pass any proper order was also dismissed by Chaudhri Mohib-ullah on the 26th of February, 1925. Two months later, on the 28th of April, Ram Richcha returned to the charge and put in a fresh application asking for the attached crops to be made over to him. On this the magistrate sent for the record of the case under section 145 and after examining the patwari, but without giving any notice to the parties to the section 145 case, who are the present applicants, passed an order directing the crops to be made over to Ram Richcha. This order was clearly made without jurisdiction. The order passed under section 145 was a final order, and it was not open either to the magistrate who passed it or to his successor to review it, or to set it aside in any way. Ram Richcha's remedy if he claimed the crops, was to go to the civil court. I accept the reference and set aside the order directing the crops to be made over to Ram Richcha. This order will govern both references.

1925

LALLAN
MISIR
v.
RAM
RICHCHA

APPELLATE CIVIL.

1925
November,
17.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

MUHAMMAD ZAKARIA (JUDGEMENT-DEBTOR) *v.* KISHAN NARAIN (DECREE-HOLDER) AND MUHAMMAD HAFIZ AND OTHERS (JUDGEMENT-DEBTORS).*

Civil Procedure Code, section 47; order XXI, rule 66—Execution of decree—Sale proclamation—Order directing notification of alleged incumbrance on property to be sold—Appeal.

No appeal will lie from an order passed in execution proceedings, at the instance of a stranger to those proceedings, directing the notification of an alleged incumbrance on the property proclaimed for sale.

THIS was an appeal from an order passed in execution proceedings in the following circumstances :

A mortgage decree for sale was in execution and a proclamation of sale was prepared and issued in the first instance under order XXI, rule 66. The date for the sale was fixed as the 9th of July, 1925. Three days before this date the respondent, Muhammad Hafiz, who was till then no party to the execution proceedings, filed an application in the execution court praying that a certain mortgage deed dated the 14th of September, 1910, in his favour be notified. An objection was raised on behalf of the judgement-debtor but the learned Subordinate Judge without deciding as to whether there was or was not any existing liability ordered that the notification asked for be issued.

The judgement-debtor appealed.

Pandit Gopi Nath Kunzru, for the appellant

* First Appeal No. 315 of 1925, from a decree of Lakshmi Narain Tandon, Subordinate Judge of Agra, dated the 6th of July, 1925.

Pandit *Shiam Krishna Dar* and *Munshi Narain Prasad Asthana*, for the respondents.

1925

MUHAMMAD
ZAKARIA
v.
KISHAN
NARAIN.

The judgement of SULAIMAN, J., after setting forth the facts as above, thus proceeded :

A preliminary objection has been taken that no appeal lies. I am of opinion that this objection is well founded. Muhammad Hafiz was not a party to the execution proceedings. Neither the decree-holder nor the judgement-debtor admitted the validity of this prior mortgage. The contesting respondent intimated to the court that this mortgage should be notified. The order passed by the court was obviously under order XXI, rule 66, with a view to include in the proclamation of sale an incumbrance on the property. The validity of the mortgage was not considered by the court or decided by it. Any order passed by the court under rule 66, directing the way in which a proclamation of sale should be drawn up on application made, is not made appealable under order XLIII of the Code. *Primâ facie* therefore no appeal would lie. The learned vakil for the appellant, however, has urged before us that inasmuch as this order was passed by an execution court and related to the execution of a decree it is appealable within the meaning of section 47. Section 47 must be read with section 2 and the effect of reading both the sections is not to make every order passed by the execution court appealable, but only such orders appealable as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in suit. By this order neither the rights of the judgement-debtor nor of the decree-holder were determined by the execution court. No appeal therefore lies.

The learned vakil for the appellant has asked us to treat this appeal as an application in revision and interfere with the order.

1925

MUHAMMAD
ZAKARIA
v.
KISHAN
NARAIN.

Sulaiman,
J.

Two objections have been raised. The first is that the court below should not have entertained an application from a person who was no party to the execution proceedings, and the second is that it was entertained at such a late stage as to prejudice the judgement-debtor. The application of the contesting respondent was made by way of an intimation to the court and the court was, under order XXI, rule 66, bound to show all incumbrances which *prima facie* existed on the property which was ordered to be sold. It is, therefore, impossible to hold that the court had no jurisdiction to take note of an alleged claim. If the notification merely informed the auction purchasers that there was a claim being put forward on behalf of Muhammad Hafiz on the basis of this old mortgage, which claim, however, was not admitted by the decree-holder or the judgement-debtor, then there was no harm in the notification. On the other hand if the notification amounted to any misstatement or misrepresentation, that may be a good ground for setting aside the sale, under order XXI, rule 90, as it would then amount to an irregularity.

Similarly, the fact that this amendment was made only a few days before the sale may be a ground for setting aside the sale if the judgement-debtor succeeds in establishing that substantial injury has been caused in consequence of the lateness of the order. That, too, is a matter which can be disposed of in the proceedings under order XXI, rule 90.

It is to be noted that pending this appeal the sale has actually taken place and any directions now made with regard to making the notification clear would be altogether useless and futile. I am, therefore, of opinion that it is impossible to interfere in

revision at this stage. I would therefore dismiss this appeal.

1925

MUHAMMAD
ZAKARIA
v.
KISHAN
NARAIN.

MUKERJI, J. :—I entirely agree that no appeal lies and that in the circumstances of this case I am not prepared to entertain the appeal as a revision from the order of the learned Subordinate Judge dated the 6th of July, 1925.

[After stating the facts, as above, the judgement continued :]

Now the question is whether an appeal is entertainable. As pointed out by my learned brother, it is not every question that arises between a decree-holder and a judgement-debtor that is appealable. In order that it may be appealable, it must be a decree and must come in section 2 of the Code of Civil Procedure. Be that, however, as it may, in this particular case, the decree-holder and the judgement-debtor were at one in attempting to defeat the claim of Muhammad Hafiz and others. It is clear, therefore, that by no stretch of imagination can the case be brought within the purview of section 2 and section 47 of the Code of Civil Procedure. No appeal, therefore, lies.

Coming to the question of revision I fail to see what irregularity has the Judge committed. The Judge was bound, in the interest of intending purchasers, to give them as much information as possible about the property which he was going to sell. If Muhammad Hafiz and others had a *bonâ fide* claim, it did not matter whether it was going to succeed or going to fail. The Judge could not enter into that intricate question. He was, in my opinion, bound to tell the intending purchasers that there was such a claim and that they might beware of it. The order,

1925

MUHAMMAD
ZAKARIA
v.
KISHAN
NARAIN.

therefore, was perfectly correct and it is not open to question by way of revision.

It has been urged upon us that the order was passed very late and that it was likely to frighten the intending purchasers. As may be guessed, the sale proclamation was issued long before the 6th of July, for the 9th of July had already been fixed for sale. If it be a fact that owing to the late notification of the claim, any intending purchaser has been frightened, not knowing clearly what was the matter, it would be a matter for the Subordinate Judge to inquire in a proceeding, if any has been taken, under order XXI, rule 90, of the Code of Civil Procedure. That has nothing to do with the case before us, at present.

I agree, therefore, that the appeal should be dismissed and there is no good ground for treating the appeal as a petition of revision. -

BY THE COURT:—The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1925
November, .
18.

Before Mr. Justice Dalal and Mr. Justice Boys.

EMPEROR v. JALAL-UD-DIN.*

Act (Local) No. IV of 1910 (United Provinces Excise Act), section 10(2)—Excise Commissioner—Power of, to dismiss subordinate excise officer—Government of India Act, section 96B, (2)—Competence of Local Government to delegate powers—Sanction to prosecute.

The Local Government is competent to delegate to the Excise Commissioner its power to dismiss an Excise Inspector, and if the Commissioner, in the exercise of such delegated

* Criminal Revision No. 409 of 1925, from an order of A. G. P. Pullan, Sessions Judge of Moradabad, dated the 6th of July, 1925.

power, dismisses an Inspector, such dismissal is not a dismissal by the Government, but by the Commissioner. Where, therefore, an Inspector, having been dismissed by the Commissioner, was thereafter prosecuted for having taken an illegal gratification, it was *held* that the sanction of the Government was not a necessary preliminary to his trial. *In re Sheikh Abdul Kadir Saheb* (1), disapproved. *Emperor v. Lala Khan Chand* (2), not applied.

1925
EMPEROR
v.
JALAL-UD-
DIN.

THIS was an application in revision from a conviction under section 161 of the Indian Penal Code, the sole ground being the absence of the preliminary sanction of the Local Government which was alleged to be necessary to the trial. The facts of the case, so far as they are necessary for the purposes of this report, appear from the earlier portion of the judgement of the High Court.

Mr. R. F. Bahadurji (with him Mr. Nehal Chand and Munshi Kedar Nath), for the applicant.

The Assistant Government Advocate (Dr. M. Wajullah) for the Crown.

DALAL and BOYS, JJ:—Jalal-ud-din, Excise Inspector of the Bijnor district, applied to the High Court in revision to have his conviction under section 161, Indian Penal Code, for taking an illegal gratification from a liquor contractor set aside. The learned Judge to whom the application was presented referred the matter to a Bench of two Judges and also issued notice to Jalal-ud-din to show cause why the sentence passed on him should not be enhanced. The applicant was sentenced by a magistrate of the Moradabad district, to whose court the case was transferred from Bijnor, to simple imprisonment for one month and a fine of Rs. 500, with three months' further simple imprisonment in default.

(1) (1916) 33 Indian Cases, 643.

(2) (1922) 72 Indian Cases, 523.

1925

EMPEROR
v.
JALAL-UD-
DIN.

The point raised in revision was that the prosecution of the applicant without the sanction of the Local Government was bad and so the trial should be set aside. The applicant is an Excise Inspector who was appointed to his post by the Local Government in 1909. Under section 197(1) of the Code of Criminal Procedure the sanction of the Local Government is necessary for the prosecution of any public servant who is not removable from his office save by or with the sanction of the Local Government or some higher authority. The applicant was appointed prior to the passing of the United Provinces Act IV of 1910. Under section 10(2) of that Act the Local Government is given power by a notification to appoint an officer referred to as the Excise Commissioner, vide clause (a), and to delegate to that officer all or any of its powers under the Act, except the power conferred by section 40 of the Act to make rules. In pursuance of such authority the Local Government issued a notification under section 10(2) (f) of the United Provinces Excise Act on the 8th of September, 1924. It is admitted that an Excise Commissioner has been duly appointed. Under the notification No. 295/XIII—110 of the 8th of September, 1924, (*U. P. Gazette* of the 13th of September, 1924, page 1249) the Local Government has delegated to the Excise Commissioner, among others, the following powers :—

“ 9. Power to appoint all officers of the Excise department below the rank of Assistant Excise Commissioner : provided that the appointment and promotion, removal or dismissal of Excise Inspectors shall be subject to the general control of the Local Government.

“ 10. Power to censure, withhold promotion from, reduce to a lower post, suspend, remove or dismiss all officers of the Excise department below the rank of Assistant Excise Commissioner.”

There is a proviso added to the powers that in case of dismissal, removal or reduction, the Excise Commissioner shall follow the procedure laid down in rule XIV of the rules made by the Secretary of State under section 96B(2) of the Government of India Act. According to this notification the applicant, who is an excise officer below the rank of Assistant Excise Commissioner, may be dismissed by the Excise Commissioner. He is, therefore, removable from his office by an authority lower than that of the Local Government and without the sanction of that Government.

1925

EMPEROR

V.

JALAL-UD-
DIN.

The arguments advanced by the applicant's learned counsel were directed to the following points:—

(1) That the applicant having been appointed prior to the date of the notification, he could not be dismissed by the Excise Commissioner.

(2) That the notification, in so far as it gave power to the Excise Commissioner to dismiss the applicant, was *ultra vires* to that extent.

(3) That the authority of the Excise Commissioner was delegated authority and even when he dismissed an excise officer it must be taken as if the dismissal was really made by the Local Government through the agency of the Excise Commissioner.

The authority No. 10 of the notification quoted by us above makes it clear that the Excise Commissioner has been given power of dismissal of excise officers below the rank of Assistant Excise Commissioner appointed even prior to the date of the notification. In our opinion the applicant could be dismissed by the Excise Commissioner.

By reference to various other notifications it would be shown that the notification to the extent of the

1925
EMPEROR
v.
JALAI-UD-
DIN.

authority No. 10 was not *ultra vires*. Reference was made to the Government of India Act, section 96B(1), wherein it is enacted that "subject to the provisions of this Act and of rules made thereunder, every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure . . . but no person in that service may be dismissed by any authority subordinate to that by which he was appointed" It was argued that the applicant, having been appointed by authority of the Local Government, may not be dismissed by any authority subordinate to the Local Government, and if any rule is made by the Local Government to that effect, it would be contrary to the provisions of section 96B(1). The clause, however, begins with the words "Subject to the provisions of this Act and of rules made thereunder." Clause (2) of the same section enacts that "the Secretary of State in Council may make rules for regulating the classification of the Civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General-in-Council or to a Local Government, or authorize the Indian legislature or local legislatures to make laws regulating the public services."

Obviously the notification of the Local Government referred to above was made under the rules referred to in clause (2). The argument that such rules can be framed with respect to officers to be appointed in future cannot hold when we consider the proviso to section 96B(2) which safeguards the existing or recurring rights only of persons appointed by the Secretary of State prior to the commencement of the Government of India Act, 1919. There would not

have been such a proviso if it was intended that the existing or recurring rights of all public servants appointed prior to the commencement of the Act were to be retained. In the notification itself reference is made to rules made by the Secretary of State under section 96B(2) of the Act. The Secretary of State for India has framed rules under section 96B(2) of the Government of India Act, 1919, regulating the classification of the civil services in India, their conditions of service, discipline and conduct. Those rules also provide for delegation of powers. They are published in the *Gazette of India* of the 21st of June, 1924, at p. 552 (No. F472/II—23). By rule 1 the following classification is made of officers of the Local Government:—

1. The All-India services,
2. The Provincial services,
3. The Subordinate services,
4. Officers holding special posts.

An Excise Inspector may come under class 2 or 3. The definition of Provincial services given in rule III proves that he comes under class 3. The Provincial services of every Local Government are detailed in a schedule to the rules, and the schedule relating to the United Provinces includes an Assistant Excise Commissioner and no officer lower in rank in that department. The applicant, therefore, is a member of the subordinate services, which are defined in rule IV as consisting of all minor administrative, executive and ministerial posts to which appointments are made by the Local Government or by an authority subordinate to the Local Government. Under rule XV, a Local Government is empowered to delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by rule XIII in regard to officers of the subordinate

1925

EMPEROR
C.
JALAL-UD-
DIN.

1925
EMPEROR
v.
JALAL-UD-
DIN.

services. Proviso to this rule relates to an appeal to the Local Government. Rule XIII lays down that "without prejudice to the provision of any law for the time being in force, the Local Government may for good or sufficient reasons remove or dismiss any officer holding a post in a . . . subordinate service." The Excise Act does not interfere with the Local Government's power of removal or dismissal; in fact, it gives such power and the power of delegation of authority over again. We are of opinion, therefore, that the authority No. 10 granted by the notification is not beyond the power of the Local Government to grant.

Coming to the question of delegation, once the Local Government has delegated its power, the authority which actually removes the public servant from office is not the authority of the Local Government but the authority to whom the power is delegated. To take an instance, the HON'BLE CHIEF JUSTICE of this Court has been authorized and empowered under section 6 of the Letters Patent of this Court, by the Crown acting in pursuance of an Act of Parliament, to appoint officials of this Court and to dismiss them. If the argument of the applicant's learned counsel is to prevail, it may with equal cogency be argued that every official down to an orderly peon of this Court is appointed and removed by the Crown through the agency of the CHIEF JUSTICE and for his prosecution under section 161 the sanction of the Local Government would be necessary. We do not think that such an argument would be accepted. There is no mention made in section 197(1) of the Code of Criminal Procedure of any delegated authority. Obviously the intention was to simplify the law regarding sanction in the new Code of Criminal Procedure, and the circle of public servants for whose prosecution for bribery

sanction was necessary under the previous Code has been narrowed. Under the former Code sanction of some authority (other than the Local Government) to whom the power was delegated by the Local Government to grant sanction, was necessary for the prosecution of certain public servants. Any sanction for prosecution in their cases is no longer necessary.

1925

EMPEROR

v.

JALAL-UD-DIN.

Two rulings were quoted in support of the contention put forward on behalf of the applicant that the dismissal by the Excise Commissioner really meant dismissal by the Local Government: *In re Sheikh Abdul Kadir Saheb* (1), and *Emperor v. Lala Khan Chand* (2).

The first case, which is a case of the Madras High Court, contains merely the opinion, unsupported by reasons, of a single Judge of that Court. With all respect we do not feel justified in following it. In the second case, which is of the Lahore High Court, and of date 24th of March, 1922, no rule had been framed to provide for cases of officers appointed previous to the date of the notification. We have already indicated that the notification of the Local Government in the present case provides for the dismissal of Excise Officers appointed prior to the date of the notification. The ruling of the Lahore High Court, therefore, has no application here.

For these reasons we decide that no sanction was necessary for the prosecution of the applicant and that his trial in the court of the magistrate was a legal trial.

We now come to the facts of the case.

[The facts were dealt with at length by their Lordships.]

We, therefore, while dismissing the application in revision, enhance the sentence of one month's

(1) (1916) 33 Indian Cases, 648.

(2) (1922) 72 Indian Cases, 523.

1925
EMPEROR
v.
JALAL-UD-
DIN.

simple imprisonment to a sentence of six months' rigorous imprisonment and maintain the fine and the alternative sentence in default of payment of the fine. The applicant will surrender to his bail.

*Application dismissed.
Sentence enhanced.*

APPELLATE CIVIL.

1925
November, .
24.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

MUHAMMAD IBRAHIM (APPLICANT) v. RAM CHANDRA
AND ANOTHER (OPPOSITE PARTIES).*

*Act No. V of 1920 (Provincial Insolvency Act), section 35—
Insolvency—Annulment of adjudication—Unconditional
release by creditor not full discharge of debt—Subsequent
interest.*

Before the provisions of section 35 of Act V of 1920 can be availed of, all the debts of the insolvent must be discharged in full. Subsequent interest, though it cannot be taken into account at the time of the first distribution of the dividends, has to be paid out of the assets, if sufficient, and is therefore a part of the debt.

Where an insolvent claimed annulment, under section 35, on the ground that all debts had been discharged by his relations but it was found that some interest was due to a creditor who had given a complete discharge of his debts, *held*, that the insolvent was not entitled to an annulment. *In re Keet* (1), *In re Subrati Jan Mahomed* (2), and *Brij Kessoor Laul v. The Official Assignee of Madras* (3), followed.

THE facts of this case were as follows :—

One Muhammad Ibrahim was adjudged insolvent on the 24th of April, 1919, and his property vested in the official receiver. On the 3rd of July, 1924, the insolvent filed an application, purporting to be under

* First Appeal No. 36 of 1925, from an order of G. O. Allen, District Judge of Saharanpur, dated the 19th of January, 1925.

(1) (1905) 2 K. B., 666.

(2) (1912) I.L.R., 38 P.M., 200.

(3) (1913) I.L.R., 43 Mad., 71

1925

MUHAM-
MAD
IBRAHIM
v.
HAM
CHANDRA.

section 38 of the Insolvency Act, setting forth a composition scheme. In this he stated that he was able to procure money from his relations and would pay up all the debts that were entered in the schedule. It appears that his son made payments out of court to various creditors and obtained receipts from them. Among these creditors was one Rura Mal. His receipt bears the date the 4th of September, 1924. Under this receipt Rura Mal no doubt admitted that he had received the amount due under his decree and promissory note and that not a single shell remained due. On the 13th of September, 1924, Rura Mal filed an application in the court stating that he had received repayment of his debts from the insolvent's son Abdul Hai and that he had no objection to the insolvent's application being granted. It appears that the debts of other creditors were also paid or discharged. On the 30th of September, 1924, a statement was made by the insolvent's vakil that his application under section 38 should be treated as an application under section 35 and that the annulment of the insolvent's adjudication should be ordered inasmuch as all the debts had been paid in full. Notice of this application was ordered to be issued. The report of the receiver was in favour of the insolvent, but Rura Mal came forward and claimed interest on his debt and also certain expenses which he had incurred in connection with the appeal in the High Court. The receiver, however, asked for Rs. 399 as his remuneration and expenses. On the 7th of December, 1924, the learned District Judge came to the conclusion that all the debts had not been discharged, inasmuch as interest due to Rura Mal had not been paid. He accordingly declined to order the annulment of the insolvent's adjudication.

The insolvent appealed.

1925
 MUHAM-
 MAD
 LERAHIM
 v.
 RAM
 CHANDRA.

Maulvi Iqbal Ahmad and Munshi Ram Nama Prasad, for the appellant.

Mr. Nihal Chand, for the respondents.

The judgement of the Court (SULAIMAN and MUKERJI, JJ.), after setting forth the facts as above, thus continued :—

The first point to consider in F. A. F. O. No. 37 is as to whether he was entitled to an annulment. Section 35 of Act V of 1920 requires that where, in the opinion of the court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the court that the debts of the insolvent have been paid in full, the court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. This is not a case where it can be said that the debtor ought not to have been adjudged insolvent. The contention of the insolvent is that the debts of the insolvent have been paid in full, inasmuch as although some amount of interest might have been outstanding, Rura Mal had given a complete and full discharge of his debts. We agree that the receipt and the application purported to give a full discharge of the debt, but even an unconditional release by a creditor cannot amount to a payment in full of the debt within the meaning of section 35. This was the view clearly expressed in the English case, *In re Keet* (1), which has been followed by Indian High Courts, vide *In re Subrati Jan Mahomed* (2) and *Briji Kessoor Laul v. The Official Assignee of Madras* (3). It is, therefore, clear that the mere release of the balance of the debt due to Rura Mal did not amount to a full payment so as to entitle the insolvent to an annulment. It has been

(1) (1905) 2 K. B., 666.

(2) (1912) I.L.R., 38 Bom., 200.

(3) (1919) I.L.R., 48 Mad., 71

argued on behalf of the appellant that Rura Mal would not have been entitled to any interest on his debt subsequent to adjudication and that such subsequent interest is not included within the expression "the debts of the insolvent" contained in section 35. Under section 48, sub-clause (2) of the Act the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled is not prejudiced after all the debts proved have been paid in full. In section 61, sub-clause (6) it is provided that where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per cent. per annum on all debts entered in the schedule. It is noteworthy that section 38 does not use the words "proved debts or debts entered in the schedule." It must, therefore, be taken that before section 35 can be availed of, all the debts of the insolvent must be discharged in full. Subsequent interest, though it cannot be taken into account at the time of the first distribution of the dividends, has to be paid out of the assets, if sufficient, and is therefore, a part of the debt. It is clear, therefore, that there was a sum of money due to Rura Mal which might have been released but was certainly not paid, though the principal sum and interest up to the date of adjudication had been paid. F. A. F. O. No. 37 of 1925, therefore, fails and is accordingly dismissed, but without costs as no one appears for the respondents.

Appeal dismissed.

1925

MOHAM
MAD
IBRAHIM
v.
RAM
CHANDRA

1925
November, .
24.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

RADHA KISHEN AND OTHERS (PLAINTIFFS) v. KASHI
NATH (DEFENDANT).*

*Act No. X of 1873 (Indian Oaths Act), sections 10 and 11—
Agreement to abide by statement made by referee—State-
ment of referee not sufficient to decide the case—Re-
examination of referee.*

There is nothing to prevent a person who has been appointed a referee under the provisions of the Indian Oaths Act, 1873, being recalled and re-examined, if it turns out that his statement as originally recorded does not contain information sufficient for the disposal of the case. *Thoyi Ammal v. Subbaroya Mudali* (1), and *Mahabir Prasad Misr v. Mahadeo Dat Misr* (2), referred to.

THIS was an appeal from an order of remand in a suit the object of which was the closing of certain windows and other reliefs. When the case came on for hearing, the parties agreed that it should be decided according to the evidence of one Babu Anand Prasad. Babu Anand Prasad was accordingly examined as a referee with the consent of the parties and he made certain statements. The learned Munsif was of opinion that the evidence given by Babu Anand Prasad covered the whole controversy between the parties and would justify a disposal of all the issues raised. He accordingly partially decreed the suit and partially dismissed it. The parties appealed and both the appeals were disposed of by a single judgment of the learned Subordinate Judge. The learned Judge was of opinion that the statement of Babu Anand Prasad was not sufficient for the disposal of the case and he remanded the suit to the court of first instance for disposal. He directed that the referee should be re-called and should be re-examined on all

* First Appeal No. 14 of 1925, from an order of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 5th of December, 1924.

(1) (1899) I.L.R., 22 Mad., 234. (2) (1891) I.L.R., 18 All 336.

the matters that were left in darkness owing to the referee not being questioned. He further said that if there were any points on which the referee could not throw any light, those points must be decided on evidence adduced by the parties.

1925

RADHA
KISHEN
v.
KASHI
NATH.

The plaintiffs appealed.

Munshi *Kamla Kant Verma* and Pandit *Ambika Prasad Pandey*, for the appellants.

The respondent was not represented.

The judgement of MUKERJI, J., after setting forth the facts as above, thus continued :—

It has been argued before us that the statement of Babu Anand Prasad was enough for the disposal of the entire suit. It is not necessary for us to examine that statement in detail. It is sufficient to say that we agree with the court below that further light was necessary on the controversy between the parties. That being so, the question is whether the referee could be called again and examined.

The parties are agreed that if there be any point which cannot be disposed of according to the statement of the referee, evidence may be led on those points by the parties. The main question for disposal in these cases is whether the referee can, as a matter of law, be re-called and re-questioned.

It appears to me that there is nothing in the Indian Oaths Act, 1873, which declares that a referee cannot be re-examined if all the points which would be necessary to be established are not put to him. It was argued on behalf of the plaintiffs that they had agreed to the examination of Babu Anand Prasad only at that particular moment when he was before the court and their agreement to abide by his statement came to an end the moment the referee was examined

1925

RADHA
KISHEN●
KASHI
NATH.

The learned counsel for the appellants has relied on the case of *Thoyi Ammal v. Subbaroya Mudali* (1). As I read that case, I find therein no authority for the proposition which the learned counsel for the plaintiffs would have established. In that case it was said that the statement of the referee was not sufficient for the disposal of the case and the court simply said that the facts which remained unproved must be proved in the ordinary way, by way of evidence. It is not clear from the judgement whether the referee was unable to throw further light on the case or whether he was not at all available or whether it was possible to re-examine him and to obtain more information from him, if he could give it. That being the case, it cannot be inferred from what was stated by the Judges that the Court held that the referee could not be examined again. On the other hand, the dictum of the learned Judges of this Court who decided the case of *Mahabir Prasad Misr v. Mahadeo Dat Misr* (2), would go to show that they were of opinion that if the referee was still alive and available he could be examined again in the case of there arising a further necessity for elucidation of the matters in dispute.

There is nothing in the Indian Oaths Act which says that the reference to the referee comes to an end as soon as the referee has been once examined. In the case of reference to arbitration we know that an award may be referred back to the arbitrator for his decision if he leaves anything undecided. The same rule ought to be followed. For, as already stated, there is nothing in the Indian Oaths Act to prevent the application of this rule. In the circumstances I would dismiss both the appeals and uphold the order of remand.

SULAIMAN, J.—I agree. The question whether a referee by whose statement the parties have agreed to

(1) (1899) I.L.R., 22 Mad., 234.

(2) (1891) I.L.R., 13 All., 386.

abide can be re-examined if certain points were omitted in his statement, is apparently not covered by any direct authority. The appellants' learned vakil relies on the case of *Thoyi Ammal v. Subbaroya Mudali* (1), where it was remarked :—" If the matter stated affords sufficient material for the decision of the suit, a decree may be passed on the facts thus conclusively proved. If the facts so proved are not sufficient for the decision of the case, *such further facts as are necessary must be proved in the ordinary way, by evidence adduced on both sides.* The facts proved by the special oath are, however, conclusively proved, and the further evidence must, in our opinion, be limited to matters not proved by the oath." On the other hand, the respondent's vakil relies on a remark in the judgement in *Mahabir Prasad Misr v. Mahadeo Dat Misr* (2) :—" Although I should always be strongly disinclined to assist a party to an agreement under the Oaths Act in getting out of it, yet I am bound to see that the object of the parties when they entered into it has been satisfactorily accomplished by the deposition of the referee, and, if that object has not been accomplished, then that *a further deposition should be obtained or, if that is impossible, as is the case here, owing to the Raja's death, that the question should be tried in the ordinary way by the court.*"

The examination of both these cases, however, shows that both these remarks were *obiter dicta* and it was not necessary to decide the point. In the Madras case the referee was the plaintiff himself and he might have been expected to be in a position to fill up the gaps. The learned District Judge, however, had remanded the case for a trial *de novo* and the Madras High Court merely decided that the statement of the plaintiff as the referee must be regarded as conclusively

1925

RADHA
KISHEN
v.
KASHI
NATH.Sulaiman,
J.

(1) (1899) I.L.R., 22 Mad., 235 (2) (1891) I.L.R., 13 All., 386.

(237)..

1925

RADHA
KISHEN
v.
KASHI
NATH.

proving the facts deposed to by him and that the further evidence should be confined to other matters. Neither party apparently asked for a re-examination of the referee and the point accordingly was not expressly decided.

In the Allahabad case the referee was dead, and no question of his re-examination arose.

It has been contended before us that once the oath was taken by the referee, the agreement was fully carried out and if either party is unwilling to accept as conclusive any further statement of the referee, such further statement should not be forced on him. But if this contention were to be accepted, the result would be that as soon as the referee has left the witness-box he cannot be recalled even by the trial court though some material statement has been accidentally omitted. It is impossible to accept this as the correct position under the Indian Oaths Act. If the trial court has power to recall a referee, there seems to be no good ground on principle why the same power should not be exercised by the appellate court if it comes to the conclusion that his statement is not complete and exhaustive.

Of course if a party were to show good ground why the referee should not be examined again, the court may under special circumstances refuse to recall him in order to fill up gaps in his statement, as it is the duty of both parties to see that his statement completely covers all the points in dispute. In this case, however, I see no good ground why the referee should not be asked to clear up certain points left vague by him.

BY THE COURT.—Both these appeals are dismissed and the order of remand is upheld with costs.

Appeals dismissed.

Before Mr. Justice Sulaiman.

1925
November, .
25.

DEBI BAKHSH (JUDGEMENT-DEBTOR) *v.* SHAM-BHU DAYAL, GANGA PRASAD (DECREE-HOLDER).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182—Execution of decree—Limitation—Wrong defendant's name put into decree —Decree corrected after several years.

On the 16th of January, 1916, a Munsif wrote a judgement in a suit in which there were three defendants, decreeing the suit as against A; but by mistake the decree was in fact a decree against B. The decree-holder, however, made three attempts, in 1919, 1922 and 1923 to execute the decree against B. After this B applied for amendment of the decree and on the 5th of January, 1924, an order was passed substituting the name of A, though no notice of this was ever given to A. On the 28th of January, 1924, the decree-holder applied to execute the decree against A.

Held that the application was within time. *Muhammad Suleman Khan v. Muhammad Yar Khan* (1), referred to.

THE sole point arising in this appeal was whether a certain application for execution was or was not time-barred. The facts of the case were as follows:—

A suit was instituted in a Munsif's court against three defendants. The suit was decreed against one of the three defendants; but by mistake the name of another of the defendants was entered in the decree. The decree was passed on the 16th of January, 1916. The decree-holder on three occasions, viz., on the 23rd of July, 1919, the 13th of July, 1922, and the 26th of February, 1923, applied for execution against the judgement-debtor named in the decree. At last that judgement-debtor applied to have the decree amended and the name of the defendant against whom the suit had been decreed inserted in it; and this was done on the 5th of January, 1924, though without notice to

* Second Appeal No. 354 of 1925, from a decree of Triloki Nath, First Subordinate Judge of Cawnpore, dated the 13th of November, 1924, confirming a decree of Makhan Lal, Munsif of Cawnpore, dated the 17th of September, 1924.

(1) (1894) I.L.R., 17 All., 39.

1925

DEBI
BAKHSH
v.
SHAMBHU
DAYAL
GANGA
PRASAD.

the party most concerned. On the 28th of January, 1924, the decree-holder applied for execution as against the *real* judgement-debtor. The judgement-debtor objected that the application was time-barred. The court overruled his objection. He appealed; but his appeal was dismissed. He then preferred a second appeal to the High Court.

Munshi *Shambhu Nath Seth*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondents.

THE judgement of SULAIMAN, J., (after reciting the facts as above) thus continued :

In second appeal the learned vakil for the appellant contends that inasmuch as there were no proceedings in execution against Debi Bakhsh from the date of the decree till the supposed amendment, the decree had become dead and no amount of amendment could revive it. His contention is that the present application for execution, even though it be within three years from the date of the amendment, is barred by time. His second contention is that the decree-holder, having exempted him in the execution department once before, is now estopped from asking for execution against him and the third point, though not taken in the grounds of appeal, is that the amendment, having been made behind his back, is a nullity and not binding on him.

If one reads the language of article 182(4) of the Limitation Act (No. IX of 1908), the first impression would be that an application for execution, if made within three years of the date of its amendment, is within time. That would seem to be a proper inference on its literal construction, as there are not any further qualifying words. But it does seem to have been held in several cases that if the decree was time-barred, and in that sense had become dead, its

amendment would not give the decree-holder a fresh start. I may refer to the case of *Anandram v. Nityananda Barham* (1), which was followed in the case of *Rabiuddin v. Ram Kanai Sen* (2). As it is not absolutely necessary in this case to decide this point finally, I assume this contention to be correct, that is to say, I assume that if the decree had become time-barred on the date of its amendment, then the decree-holder cannot get a fresh start.

1925

DEBI
BAKHSB
v.
SHAMBEET
DAYAL
GANGA
PRASAD.

As regards the question of an amendment behind the back of the appellant I must concede that it was unfair to amend the decree without giving Debi Bakhsh an opportunity to show cause against it. But if the amendment has been wrongly made, it is still open to Debi Bakhsh to apply to the original court which has amended the decree for a review of its order on the ground that it was passed behind his back and that it is unjust or wrong. It is not necessary for me in this appeal to express any final opinion as to whether the order for amendment was right or wrong. I have, in stating the facts, assumed it for the purpose of this appeal that the amendment was correct.

As regards the question of exemption it is obvious that the decree-holder's vakil was bound to exempt Debi Bakhsh and Debi Sahai from the execution proceedings taken under the wrong decree. The names of these persons were not in the decree and they could not be proceeded against. That exemption, in my opinion, would not amount to an estoppel when subsequently it was discovered that the decree was wrongly prepared and was in fact amended.

The main question which I have to decide is whether the present application is barred by time. This depends on the further question whether the

(1) (1916) 32 Indian Cases, 744.

(2) (1920) 59 Indian Cases, 166.

1925

DEBI
BAKHSHSHAMBHU
DAYAL
GANGA
PRASAD.

decree was kept alive by successive applications made in 1919, 1922 and 1923 against Bhawani Shanker whose name had been wrongly entered in the decree and not against Debi Bakhsh, the true judgement-debtor. The learned vakil for the appellant has strongly contended before me that execution proceedings taken against strangers can in no sense keep the decree alive and that all these applications must be deemed to have been applications not in accordance with law. He has distinguished this case from cases where execution is taken out against joint judgement-debtors. It is no doubt a fact that Bhawani Shanker's name was wrongly entered in the decree. But so long as the wrong decree stood, the only person against whom the decree-holder could proceed was Bhawani Shanker. He could not before amendment really proceed against Debi Bakhsh. The applications for execution which he filed were on the face of the wrong decree the only applications which he could have made and therefore in my opinion they must be deemed to have been made in accordance with law. The defect was not so much in the applications as in the decree sought to be executed. The applications themselves were perfectly in order. They were therefore proper applications under article 182 of the Limitation Act. If this were not the correct law then the result would be that if by a mistake the name of a wrong judgement-debtor is substituted in a decree and the mistake is not discovered for three years, the decree-holder would be without any remedy. I do not consider that this is the true position. The applications were proper applications so long as the decree remained unamended, with the result that the decree must be deemed to have been kept alive up to 1923. The present application having been filed within three years of the last application is also within time. In

this view of the matter it is not necessary for the decree holder to fall back on article 182(4) and calculate time from the date of the amendment, namely, the 5th of January, 1924. The propriety of the order of amendment has been left open by me.

There is another aspect of the case according to which also the application for execution can be held not to be time-barred. As the name of Debi Bakhsh had been omitted from the wrong decree, that decree before its amendment was incapable of execution against Debi Bakhsh. It was not possible for the decree-holder to take any steps by way of execution against him. It is only since the decree has been amended and the name of Debi Bakhsh brought on the record as a judgement-debtor that a right to apply to execute the decree against him has accrued. It seems to me that under these circumstances the decree-holder is entitled to execute it against him. This view is supported to some extent by the observations in the case of *Muhammad Suleman Khan v. Muhammad Yar Khan* (1), that the corresponding article in the old Limitation Act must be deemed to necessarily contemplate the existence of a decree capable of being executed at the date of the decree and that that article would not apply if a wrong decree incapable of execution were passed.

The appeal is accordingly dismissed. As, however, a difficult point of law arose owing to the negligence of the plaintiff in not seeing that the correct decree had been prepared, I direct that the parties should bear their own costs of this appeal.

Appeal dismissed.

[This judgement was affirmed in Letters Patent Appeal No. 7 of 1926, by MEARS, C. J., and LINDSAY, J., on the 12th of March, 1926.—ED.]

(1) (1894) I. L. R., 17 ALL., 39 (41).

1925

DEBI
BAKHSH
v.
SHAMBHU
DAYAL
GANGA
PRASAD.

REVISIONAL CIVIL.

1925
November,
26.

Before Mr. Justice Mukerji.

RAM SARAN DAS (APPLICANT) v. GIRDHARI LAL AND
OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, order XXI, rule 90—Execution of decree—Application to set aside sale on ground of material irregularity—Subsequent application giving additional particulars, made beyond time—Revision.

Where an application to set aside a sale held in execution of a decree on the ground of material irregularity in publishing and conducting it has been filed within time, the court is not debarred from considering a subsequent application giving further details as to the reasons why the sale should be set aside, merely because such second application was not filed within thirty days of the sale.

Held, also, that revision lay where the lower appellate court had refused to consider such second application and had reversed the first court which had set the sale aside. *Harbans Lal v. Kundan Lal* (1) and *Yad Ram v. Sundar Singh* (2), distinguished.

THIS was an application in revision against an order of the third Additional Subordinate Judge of Aligarh, whereby he reversed the order of a Munsif setting aside a sale in execution of a decree. The sale was held on the 17th of September, 1924. On the 14th of October, 1924, the judgement-debtor applied to the executing court to set aside the sale upon the ground that there was material irregularity in the publishing and conducting of it and that the price fetched was in consequence too small. On the 25th of October, 1924, the petitioner put in a further application pointing out that two incumbrances to the total amount of Rs. 5,807 had been shown in the proclamation of sale, whereas no such incumbrances actually

* Civil Revision No. 105 of 1925.

(1) (1898) I.L.R., 21 All., 140.

(2) (1923) I.L.R., 45 All., 425.

existed at the date of the advertisement. The Munsif found that this was a fact, and in consequence set aside that sale. On appeal the Subordinate Judge reversed the decision and confirmed the sale, being of opinion that the Munsif was not entitled to consider the matters alleged in the application of the 25th of October, 1924, inasmuch as that application had been filed more than thirty days from the date of the sale. The judgement-debtor came to the High Court in revision.

Babu *Hem Chandra Mukerji*, for the applicant.

Babu *Piari Lal Banerji*, for the opposite parties.

The judgement of MUKERJI, J., after stating the facts as above, thus proceeded :—

The learned Subordinate Judge has misread the ruling in *Harbans Lal v. Kundan Lal* (1). All that was laid down there was that when an application is made for setting aside the sale on the ground of material irregularity in publishing and conducting a sale and consequent substantial loss, it is not open to the judgement-debtor to rely on some other grounds for the same purpose. In this case the application was based on the ground of material irregularity, and it was only by way of additional particulars that it was pointed out that two heavy incumbrances which did not exist had been notified. On the merits, therefore, the applicant has a good case. If the applicant succeeds, the case will have to go back to the court of first instance, because the lower appellate court has remarked that the auction-purchaser had no opportunity of meeting the allegation that the incumbrances notified did not in fact exist.

Mr. *Piari Lal Banerji* on behalf of the respondent has taken up the plea that no revision lay and he relies on the Full Bench case of *Yad Ram v. Sundar Singh* (2). That case is clearly distinguishable. In

(1) (1908) I.L.R., 21 All., 140.

(2) (1923) I.L.R., 45 All., 425.

1925

RAM
SARAN
DAS
v.
GIRDHARI
LAL.

1925

RAM
SARAN
DAS
v.
GIRDHARI
LAL.

this case the learned Judge of the appellate court had to consider whether the allegation made on the 25th of October, 1924, could or could not be taken into consideration in deciding the application made on the 14th of October, 1924. While purporting to follow a ruling of this Court, he really misread that ruling and refused to consider the application of the 25th of October, 1924. If he had considered the application of the 25th of October, 1924 and had come to the conclusion rightly or wrongly that he should not consider the application because the judgement-debtor had no right to apply for an amendment of this previous application, I should have held that no revision lay. But he did not at all consider the application of the 25th of October, 1924. He had jurisdiction to consider the matter and he refused to consider it. In doing so he acted with material irregularity. I hold that a revision does lie. I allow the application, set aside the order of the court below and also the order of the court of first instance and send back the case to the court of first instance.

Costs in this Court and in the lower appellate court will abide the result.

Application allowed.

REVISIONAL CRIMINAL.

1925

November,
18.

Before Mr. Justice Sulaiman.

EMPEROR v. INDAR SINGH.*

Act No. XLV of 1860 (*Indian Penal Code*), sections 403 and 406—*Dishonest misappropriation and criminal breach of trust—Misappropriation not necessarily for the benefit of the misappropriator himself—Trustee repudiating the trust and setting up the rights of a third person.—Provision for civil liability no bar to criminal liability.*

Section 403 of the *Indian Penal Code* is in no way restricted to appropriating property to one's own use. If a trustee

* Criminal Revision No. 449 of 1925, from an order of Kauleshar Nath Rai, Additional Sessions Judge of Moradabad, dated the 21st of July, 1925.

repudiates the trust and asserts that he holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much as he would have been said to misappropriate it if he had been putting forward his own claims to it.

1925

EMPEROR

v.

INDAR
SINGH.

Where attached property is entrusted to a custodian, the mere existence in the *supurdnama* of a stipulation that on failure to produce the property he will be liable to pay a stated sum as price does not necessarily absolve him from criminal liability for misappropriation.

This was an application in revision against the applicant's conviction of an offence under section 406 of the Indian Penal Code. The facts were as follows :—

One Harbans was declared an insolvent and Lala Ram was appointed receiver of his estate in January, 1925. The receiver attached certain heads of cattle belonging to the insolvent and made them over to the applicant after taking a *supurdnama* from him. The receiver first fixed the 13th of February for sale and three days earlier he sent a notice to the applicant to produce the cattle at the place where the auction was to take place, but the notice was returned unserved and no auction took place. On this the receiver fixed another date for sale and sent a fresh notice to the applicant but even on that date the cattle were not produced, nor did the applicant turn up. Subsequently the receiver received a notice from the applicant to the effect that the cattle attached by the receiver did not belong to the insolvent but belonged to his brother, who had filed an objection in the execution court, and that the receiver had no right to attach them. The receiver replied that the applicant was bound to produce the cattle and he had no right to stop their production even if the insolvent's brother had filed an objection.

1925

EMPEROR
v.
INDAR
SINGH.

To this the applicant replied that the *supurdnama* was not binding on him and that he in fact filed a complaint under section 420 of the Indian Penal Code in respect of it. On such reply being received the receiver, with the permission of the Additional District Judge, filed a complaint out of which this revision has arisen.

The complaint filed by the accused under section 420 was dismissed summarily and he has not had that order revised. At the trial of the present case the accused denied that any cattle of Harbans had in fact been attached or handed over to him and he even denied a proper execution of the *supurdnama*. The courts below, however, have found these questions of fact against the applicant.

The applicant was convicted under section 406, Indian Penal Code, and the conviction was upheld in appeal. He then applied in revision to the High Court.

Pandit *M. N. Raina*, for the applicant.

The Assistant Government Advocate (*Dr. M. Wali-ullah*), for the Crown.

The judgement of *SULAIMAN, J.*, after stating the facts as above, thus proceeded :—

The learned vakil for the applicant has argued, firstly, that no offence under section 406 was committed as there has been no misappropriation, and, secondly, that in view of a clause in the *supurdnama* for the payment of the price of the cattle, there was no criminal misappropriation.

The applicant has not put the cattle to his own use nor has he disposed of them dishonestly. What has happened is that he is holding them still as trustee, but he is denying that he is holding them on behalf of the receiver from whom he had taken them. He now asserts that the cattle belong to another

person on whose behalf he holds them. Misappropriation has not been expressly defined in the Indian Penal Code. The illustrations to section 403 all relate to cases where a person appropriates the article to his own use, but the illustrations cannot be taken to limit or narrow the scope of section 403 itself. It seems to me that if a person sets apart an article for the use of another person, of which article he is a trustee of the complainant, he misappropriates it even though he has not put it to his own use. Section 403 is in no way restricted to appropriating property to one's own use. If a trustee repudiates the trust and asserts that he now holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much as he would have been said to misappropriate it if he had been putting forward his own claim to it. The applicant got possession of the cattle from the receiver and undertook to return them to the receiver. When subsequently he repudiated the right of the receiver to attach the cattle and asserted that they really belonged to the insolvent's brother and that he would not hand them over to the receiver, he must be deemed to have committed a misappropriation.

As regards the second point, the relevant portion of the *supurdnama* is as follows: "Whenever the court or the receiver demands the production of the attached property I shall deliver the same without objection. If for any reason I fail to deliver them, then I shall pay the price, Rs. 950." The argument of the learned vakil for the applicant is that when it was clearly stipulated that in case of failure to deliver the cattle the applicant would be liable to pay their price amounting to Rs. 950, his default cannot amount to a criminal misappropriation, and that at best his liability was only a civil liability.

1925

EMPEROR
v.
INDAR
SINGH.

1925
 EMPEROR
 v.
 INDAR
 SINGH.

But the mere fact that there was a civil liability does not necessarily absolve one from criminal liability. When a receiver attaches property and entrusts it to some person in the village, he does not purport to sell it to him or dispose of it at that time. The receiver may not even be in a position to know its true value. The intention of the parties is that the articles should be returned in specie or produced at the time when the auction sale is to take place. The covenant that the accused would be liable to pay a certain amount is more by way of security than because the property is transferred to him with liberty to dispose of it or withhold it. In such cases it is the true intention of the parties which must be taken into account. There can be no doubt that in this case it could never have been the intention of the receiver that the property attached should not be actually produced when the auction is to take place. If such property is not produced, the insolvent as well as the creditors may suffer, for it cannot be known beforehand what actual price would be fetched at the sale.

I dismiss the application.

Application dismissed.

APPELLATE CIVIL.

1925
 December,
 1.

Before Mr. Justice Boys and Mr. Justice Banerji.

SHIB NARAIN (PLAINTIFF) v. GAJADHAR AND OTHERS
 (DEFENDANTS).*

Mortgage—Three documents executed one after another between the same parties—Mashrut-ul-rahn—Redemption—Mortgagor not entitled to redeem one without redeeming all three.

A mortgagor sold his equity of redemption in respect of three mortgages to the son of the original mortgagee. The

* Second Appeal No. 826 of 1923. from a decree of E. Bennet, District Judge of Agra, dated the 15th of February, 1923, confirming a decree of Abdul Hasan, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, dated the 2nd of June, 1921.

first mortgage was a usufructuary mortgage for Rs. 500. The second, which was for Rs. 200, recited the first mortgage for Rs. 500, and made redemption conditional on the discharge of the second loan also. The third, after reciting the total prior debt of Rs. 700, referred to a subsequent *mashrut-ul-rahn* document for Rs. 200, which was being taken back, and then said that "Rs. 99 were being taken in cash, and for this total Rs. 299 the mortgagor was executing this fresh *mashrut-ul-rahn* document." It was further declared that the executant would pay this Rs. 299 before discharging the earlier debt and would pay up all interest before taking possession. The purchaser sued for redemption; but of the first mortgage only.

Held that the plaintiff was not entitled to redeem the first mortgage without also redeeming the other two. But in the circumstances the Court allowed him to amend his plaint and ask for redemption of all three together. *Ranjit Kham v. Ramdhan Singh* (1), *Brij Lal Singh v. Bhawani Singh* (2), *Har Prasad v. Ram Chandar* (3), referred to. *Bhartu v. Dalip* (4) and *Kesar Kunwar v. Kashi Ram* (5), distinguished.

The suit was by one Shib Narain, who had purchased the rights of the mortgagor, for redemption of a usufructuary mortgage, dated the 21st of May, 1864, made by Govind Prasad in favour of Chaudhri Behari Lal.

This mortgage was for a sum of Rs. 500 and was admittedly a usufructuary mortgage.

It had been followed by a second mortgage on August 14th, 1864, for Rs. 200 in favour of the same mortgagee. It recited the first mortgage for Rs. 500 and further declared that the mortgagor should not be entitled to redeem without discharging the second loan also.

This was again followed by a third mortgage on June 1st, 1867, in favour of the same mortgagee. It recited the prior total debt of Rs. 700; it referred to a subsequent *mashrut-ul-rahn* document for

(1) (1909) I.L.R., 31 All., 482.

(2) (1910) I.L.R., 32 All., 651.

(3) (1921) I.L.R., 44 All., 37.

(4) (1906) 3 A.L.J., 672.

(5) (1915) I.L.R., 37 All., 634.

1925

SHIB
NARAIN
v.
GAJADHAR.

1925

SHIB
NARAIN
v.
GAJADHAR.

Rs. 200 which was being taken back (and with which we are no further concerned) and then said that Rs. 99 was being taken in cash and for this total Rs. 299 the mortgagor was executing this fresh *mashrut-ul-rahn* (the deed itself contains this description) document; and it was further declared that the executant would pay this Rs. 299 first before discharging the earlier debt, and would pay up all interest before taking possession.

On the 23rd of August, 1880, an agreement was signed between one Baldeo, the father of Gajadhar, the principal defendant respondent in this case, and Chaudhri Behari Lal, the mortgagee abovenamed, in which Chaudhri Behari Lal is said to have recognized Baldeo as half owner in, at any rate, the first mortgage, and one of the questions we have to decide is whether this agreement recognized him as half owner of the second and third mortgages also.

On the 6th of December, 1914, the heirs of Govind Prasad, the mortgagor, sold the equity of redemption to Shib Narain, the present plaintiff, who is the son of the deceased Chaudhri Behari Lal the mortgagee. The result of this transaction was that Shib Narain became the sole owner of half the property and owner of the equity of redemption in regard to Baldeo's half.

On the 5th of December, 1919, Shib Narain filed this suit for redemption, in respect of the first mortgage, of the half mortgaged to Baldeo. He alleged that he had deposited certain monies under section 83 of the Transfer of Property Act; that the defendant refused to withdraw the amount; and that now, on the other hand, there was due to him, Shib Narain, a sum of Rs. 650. The defence was that the defendant Gajadhar, son of Baldeo, now deceased, was also

entitled to a half share in the second and third mortgages, and further that the first mortgage could not be redeemed without prior or at least simultaneous discharge of the second and third. Both points were decided against the plaintiff by both courts and the suit was dismissed *in toto*.

The plaintiff appealed.

Pandit *Braj Nath Vyas* and Munshi *Baleshwari Prasad*, for the appellants.

Pandit *Uma Shankar Bajpai* and Munshi *Narain Prasad Ashthana*, for the respondents.

The judgement of the Court (BOYS and BANERJI, JJ.) after setting forth the facts as above, thus continued. :—

Three points arise for determination in this case.

First, whether the defendant Gajadhar, son of Baldeo, is entitled under the agreement of the 23rd of August, 1880, to a half share only in the first mortgage, or also to a half share in the second and third mortgages.

The second question is, whether the defendant could insist upon the discharge of the second and third mortgages at the same time as the redemption of the first usufructuary mortgage.

The third question is, if it be held that the plaintiff could only obtain redemption of the first mortgage on condition that he also discharged the second and third, could he now be given a decree in respect of all three mortgages when he had only asked for redemption in regard to the first.

We will consider first the agreement of 1880. That contains the words :—" *Girwi ki 70 bigha 4 biswa* ", and later the words,—" *Hamaro tumharo jo hissa barabar ka hai* ". It is urged for the appellant that the word "*girwi*" indicates that this

1925

SHIB
NARAIN
v.
GAJADHAR.

1925

SHIB
NARAIN
v.
GAJADHAR.

acknowledgement of equal shares could refer only to mortgages of the nature of a usufructuary mortgage and could not refer to the second and third mortgages. We see no justification for this restriction of the term, but we may add that even if that were a justifiable interpretation of the word, there is authority in the judgement of Mr. Justice BANERJI in *Har Prasad v. Ram Chandar* (1), for holding that even the second and third mortgages in this case may be regarded as usufructuary mortgages. It is not, however, necessary to press that, for, as we have said, there is nothing in the word "*girwi*", so far as we are aware, to restrict it to a usufructuary mortgage. On the other hand, we think that the words "*girwi ki*" were here only used as descriptive of all the mortgagee rights of the parties in the property specified, as distinguished from their vendee rights in other property referred to as "*bainamah ki*". Further, for the appellant reliance was placed on an admission said to have been made by the defendant Gajadhar in cross-examination that his right to possession was only based on the first usufructuary mortgage-deed. This would clearly not be sufficient to preclude him from maintaining that the three mortgages were really one. It is obvious that in one sense his claim for possession would be based on his first usufructuary mortgage. The statement was, moreover, brought out in cross-examination, but in examination-in-chief he had already definitely asserted his claim to be based on all the three mortgages. We hold, therefore, that the defendant had in fact a half share in all three of the mortgages, and we decide this question against the appellant.

The second question is, can the defendant compel simultaneous redemption of the second and

(1) (1921) I.L.R., 44 All., 37.

third mortgages? The plaintiff appellant claims that he cannot. It is urged for him that he need not redeem simultaneously the later mortgages, unless they "consolidated the old and the new transactions". It would seem that of this class of case there may be three types, where it is suggested (1) that the first mortgage cannot be redeemed unless the second mortgage is first or simultaneously redeemed; (2), that the second mortgage cannot be redeemed unless the first mortgage is first or simultaneously redeemed, and (3) that neither the first nor the second can be redeemed separately. The present case is alleged by the defendant to be of the first type, with this addition that there is a third mortgage which bears to the first two the same relation that the second bears to the first.

We will consider first whether the first mortgage can be redeemed without redeeming the second.

We have set out at the commencement of this judgement the terms of the deeds sufficiently for the present purpose.

In support of his claim to redeem the first mortgage alone, the appellant relies on *Bhartu v. Dalip* (1) and *Kesar Kunwar v. Kashi Ram* (2). In *Bhartu v. Dalip* (1), it is clear that the restrictive agreement embodied in the later mortgage was misread and the effect of the particular decision was explained away in the later decision by the same learned Judge in *Brij Lal Singh v. Bhawani Singh* (3), which we shall notice later when considering the cases that support the respondent. The other case, *Kesar Kunwar v. Kashi Ram* (2), relied on for the appellant, helps him no more. In that case it was

1925
SHIB
NARAIN
v.
GAJADHAR.

(1) (1900) 8 A.L.J., 672.

(2) (1915) I.L.R., 37 All., 634.

(3) (1910) I.L.R., 32 All., 651.

1925
 SHIB
 NARAIN
 v.
 GAJADHAR.

only held that (assuming that, if the second mortgage was not time-barred, the defence would be a good one that it must be paid off before redeeming the first mortgage) where there was a provision that the first mortgage should not be redeemed without paying off the second, and the second was in fact barred by limitation, the court could not possibly allow the defendant to rely on the condition as to first discharging the second mortgage and so in fact enable him to secure payment of a debt which he had allowed to become time-barred.

For the defendant respondent reliance was placed on *Ranjit Khan v. Ramdhan Singh* (1), *Brij Lal Singh v. Bhawani Singh* (2), and *Har Prasad v. Ram Chandar* (3). We are perfectly satisfied that on the terms of the second mortgage it is governed by the principles laid down in the three cases that we have quoted; that it is in the nature of an additional mortgage hypothecating the property, and that, on the principles laid down in those three cases, the plaintiff mortgagor was not entitled to redeem the first mortgage without at the same time discharging the second.

The case of the third mortgage is even more clear. In that the expression "*mashrut-ul-rahn*" specifically occurs, and as regards this mortgage counsel for the appellant has not found it possible to resist seriously the contention of the defendant that this third mortgage must be discharged before, or simultaneously with, redemption of the first.

As to the third question it has similarly not seriously been contended that the plaintiff could obtain redemption of the first mortgage and discharge the second and third on his prayer, as at

(1) (1909) I.L.R., 31 All., 482 (2) (1910) I.L.R., 32 All., 651.
 (3) (1921) I. L. R., 44 All., 37.

1925

SHIB
NARAIN
v.
GAJADHAR.

present framed, in which the relief asked for has only referred to the first mortgage. But it is urged on his behalf that we should allow him now, even at this stage, to amend his plaint, and remand the case to the lower court for determination of the question as to how much is due on all three mortgages together. This course was permitted in *Brij Lal Singh v. Bhawani Singh* (1), though it appears not to have been followed in the earlier case, *Ranjit Khan v. Ramdhan Singh* (2).

We think that such a prayer should not be too readily granted; that in view of the decisions to which we have referred, the law as interpreted by this Court, at any rate, should be well enough known. In the present case, however, we are prepared to accede to the prayer. We have, therefore, given the appellant permission to amend the plaint so as to ask for relief as regards the second and third mortgages also, and, that amendment having been made, we remand this case to the court of first instance through the lower appellate court under order 41, rule 25 with directions to take such further evidence as may be necessary, and to determine the amount that may be due by the plaintiff to the defendant on foot of all three mortgages. On return of the finding the usual ten days will be allowed for filing objections.

[On receipt of the finding, the appeal was allowed, and order passed decreeing the plaintiff's suit for redemption.]

Appeal allowed.

(1) (1910) I.L.R., 32 All., 651.

(2) (1909) I.L.R., 31 All., 482.

REVISIONAL CIVIL.

1925
December,
1.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

IN THE MATTER OF DURGA BAI.*

Act No. VIII of 1890 (*Guardians and Wards Act*), section 31, sub-section 3, clause (d); section 48—Order of District Judge limiting amount to be spent on marriage of ward—Revision—Appeal.

An order passed by the District Judge under section 31, sub-section 3, clause (d) regarding the amount to be spent by the guardian on the minor's marriage is not appealable and no revision lies from such a decision under section 48 simply on the ground of inadequacy of the amount awarded. *Ram Jas v. Chani* (1), not followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the order of the Court.

Munshi *Shabd Saran*, for the applicant.

WALSH and KANHAIYA LAL, JJ.:—This is an application in revision against an order made by the District Judge of Agra with regard to the disposition of the funds of certain minors by their guardian. The girl is 13, and the learned Judge, by the order complained of, has allowed Rs. 100 for her marriage, and Rs. 50 for the education of the boy. The grounds for this application are that having regard to the status of the ward and the customary expenditure upon marriage ceremonies in a Hindu family, at least Rs. 500 should have been awarded. It seems to us that *prima facie* there is something to be said for this contention. Rs. 100 is certainly small. On the other hand, it sometimes happens that people, when left to their own devices, spend proportionately a larger sum than is prudent upon marriage ceremonies, and we appreciate the fact that

* Civil Revision Application of 1925.
(1) (1920) 55 Indian Cases, 587.

1925

IN THE
MATTER
OF DUBGA
BAL.

in all probability the Judge was desirous of preventing extravagance and of protecting the interests of the minors during the remaining part of their tutelage, having regard to the total funds available for their benefit. These are matters strictly within the discretion of the District Judge, the Act having rightly vested jurisdiction in the principal civil court in the locality to decide what is best in such matters, having regard to the interests of the minors in the future as well as in the present. The learned Judge, in any event, is in a better position than the High Court to know what proportion of the funds available ought to be allowed to be expended upon an important event like a marriage. We are asked to interfere under section 48 which is equivalent to section 115 of the Code of Civil Procedure. We are of opinion that a revision does not lie in a matter which is purely a question of amount and a question of discretion, and we do not think that the case cited from the Lahore Court (1), in which a single Judge expressed an opinion, which was only a dictum, that a revision might lie, is an adequate authority to justify interference. On the other hand, we appreciate the motives which have led to this application, and we think it possible that the learned Judge might come to the conclusion, on reconsideration, that the amount might be increased without injury to the future prospects of the minors, and that the better course would be for him to give notice to the parties and re-open the matter with a view to considering whether the sum of Rs. 100 for the marriage expenses is sufficient. In form this application is rejected.

(1) (1920) 55 Indian Cases, 587.

Application rejected.

APPELLATE CIVIL.

1925
December,
1.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.
SHEORAM SINGH AND OTHERS (PLAINTIFFS) v. BABU
SINGH AND OTHERS (DEFENDANTS).*

*Act No. IX of 1908 (Limitation Act), schedule I, article 132—
Mortgage—Construction of document—Mortgage by con-
ditional sale—English mortgage.*

By the terms of a mortgage executed in 1903 it was provided that "if default is made in payment of interest, at the time of such default the mortgage deed shall be treated as a sale deed and the mortgage money as sale consideration." In 1922 the mortgagee sued to recover the mortgage money, no payment of interest ever having been made since the execution of the deed.

Held (1) that the mortgage must be construed as a mortgage by conditional sale to which article 132 of the first schedule to the Indian Limitation Act, 1908, applied, and (2) that time began to run against the mortgagee from the date when the first instalment of interest became due and was not paid. *Vasudeva Mudaliar v. Srinivasa Pillai* (1), *Girwar Singh v. Thakur Narain Singh* (2) and *Shib Dayal v. Meharban* (3), referred to.

THIS was a suit to recover money on a mortgage. The main defence was limitation, and the decision of the point of limitation turned upon the precise category of mortgage to which the document in suit belonged. The parties themselves described it as a mortgage by conditional sale, and it was drawn up in the form usually employed in this part of the country for such deeds. Moreover it contained a covenant to the effect that "if default is made in payment of interest, at the time of such default the mortgage deed shall be treated as a sale deed and the mortgage money as sale consideration." The trial court treated the deed as a mortgage by conditional

* First Appeal No. 280 of 1922, from a decree of Raja Ram, Second Subordinate Judge of Cawnpore, dated the 10th of April, 1922.

(1) (1907) I.L.R., 30 Mad., 426.

(2) (1887) I.L.R., 14 Calc., 730.

(3) (1922) I. L. R., 45 All., 27.

sale, and, applying article 132 of the first schedule to the Indian Limitation Act, 1908, dismissed the suit.

The plaintiffs appealed.

Dr. *Kailas Nath Katju*, for the appellants.

Maulvi *Iqbal Ahmad*, for the respondents.

WALSH, J.—The main question in this appeal is which article of the Limitation Act applies to this mortgage. The learned Judge in the court below has applied article 132. If this is a mortgage by conditional sale, that would be right. We are of opinion that it is a mortgage by conditional sale. In the first place the parties so described it. That would not be conclusive, but the vernacular word employed is always used as meaning mortgage by conditional sale, and the general form of the document corresponds to such mortgages as drawn in these Provinces. In the second place, there is a provision that if default is made in payment of interest, at the time of such default the mortgage-deed shall be treated as a sale-deed. In other words, it is ostensibly a bargain and sale to be defeated by a condition subsequent, namely, the payment of interest. But if default is made in the payment of interest, then it becomes a real sale, and the definition in section 58 of the Transfer of Property Act provides that such a transaction is a mortgage by conditional sale. Thirdly, the plaintiffs by their plaint did not ask for foreclosure or sale, or for a sale at all, but sued for the money or for foreclosure, clearly treating their rights as governed by the law applicable to a mortgage by conditional sale, in respect of which a decree for sale is prohibited by section 67. We are asked, on the other hand, to hold that article 147 applies on the ground that this was not really a mortgage by conditional sale, but (although not an English mortgage), a mortgage in respect of which the mortgagee

1925

SHEORAM

SINGH

P.

BABU

SINGH.

1925

SHEORAM
SINGH
v.
BABU
SINGH.

Walsh, J.

might sue for foreclosure or sale, and we are asked to apply article 147 to such a document in spite of the judgement of the Privy Council in the case of *Vasudeva Mudaliar v. Srinivasa Pillai* (1). We are unable to do so. We regard the judgement of the Privy Council in that matter as peremptory and binding upon us. Whether or not their Lordships' observations were necessary for the disposal of the case, they were considered observations delivered for the express purpose of setting at rest a question which was much controverted at the time in India, and they held that article 147 was applicable only to the class of mortgage generally known and defined by the Transfer of Property Act as an English mortgage. They gave preponderating reasons for adopting this view. The second was that there was a presumption that the legislature, when it repeated in a later Act an expression which had obtained a settled meaning by judicial construction, intended the words to mean what they meant before. That reason applies with even greater force to their Lordships' view at the present day than it did then. The judgement was delivered in 1907. The provisions of the Transfer of Property Act were re-enacted, so far as they apply to remedies in respect of mortgages, in the first schedule to the Civil Procedure Code of 1908, and article 147 of the Limitation Act has been re-enacted in the Limitation Act of 1908 without change, and therefore bearing the narrower interpretation given to it by the judgement of the Privy Council to which we have referred. We hold, therefore, that article 132 applies to this case. It follows that the claim is barred unless the plaintiffs establish payment of interest sufficient to take the case out of the mischief of the statute. The law has been settled

(1) (1907) I.L.R., 30 Mad., 426.

until it is reversed elsewhere, that in a mortgage in this form the statute begins to run from the time when default is made in payment of an instalment of interest, where the mortgagee is given the right on such default to sue for the whole amount. The question of the payment of interest is a question of fact which the learned Judge has disposed of in an emphatic judgement.

1925

SHEORAM
SINGH
v.
BAFU
SINGH

[His Lordship here discussed the evidence and continued.]

Nothing has been shown which would justify us in differing from the learned Judge upon these findings of fact. The result is that the appeal fails and is dismissed with costs.

KANHAIYA LAL, J.—I wish to add a few observations as to the questions which have been argued before us in the course of the hearing. The plaintiffs sought to recover money due on a mortgage effected by Darshan Singh, the predecessor of the defendants, in favour of Prag Singh, the predecessor of the plaintiffs, on the 7th of August, 1903. The mortgage-deed provided for the payment of the mortgage money with interest thereon at eleven annas per cent. per mensem within seven years, and further contained a stipulation that the interest accruing due for the half year shall, if not paid up, be added to the principal amount, and that if interest for any six months remained unpaid, the mortgagee shall have power either to bring a suit in respect of the entire mortgage money and interest without waiting for the expiry of the stipulated period or to wait for the payment of the principal and interest and compound interest till the expiry of the term fixed. It is further stated that both the conditions

1925

SHEORAM
SINGH
v.
BABU
SINGH.

Kanhaiya
Lal, J.

were left entirely to the choice or option of the mortgagee, that the mortgagee had liberty to act in accordance with either of those conditions, that is to say, either to bring a suit in respect of the entire mortgage money and interest without waiting for the expiry of the stipulated period, or to waive the default and wait for the payment of the principal and interest and compound interest agreed till the expiry of the term fixed. In fact the mortgagor covenanted that in no circumstances he shall have power to raise any objection or make any refusal, and he further agreed that if at the stipulated time the money remained unpaid, the mortgage deed shall be treated as a sale-deed, and the mortgage money as the sale consideration.

The allegation of the plaintiffs was that they had received Rs. 600 on account of interest at different times from one of the defendants, and they sued for the foreclosure of the mortgage in case the mortgage money was not paid within such time as might be fixed by the court for the purpose.

The defendants pleaded *inter alia* that they had made no payments towards the mortgage money, and that the claim was barred by limitation. There were other pleas raised in defence with which this appeal is not concerned.

The court below dismissed the suit, holding that the plaintiffs had failed to establish that the defendants had made any payments towards interest as such within the meaning of section 20 of the Limitation Act (IX of 1908). On the other points raised in the suit it gave its findings in favour of the plaintiffs. The sole question for determination in this appeal therefore is whether the claim of the plaintiffs is within time, either by reason of the covenants entered

in the mortgage-deed, or of the payments alleged to have been made by the defendants. The court below applied article 132 of the Indian Limitation Act which provides a limitation of 12 years for a suit to enforce payment of money charged upon immovable property, and that period is to be computed from the time when the money becomes due. Under one covenant that money was to have fallen due on the expiry of seven years unless repaid at any time within that period. By another covenant it could have been claimed on the non-payment of interest for any 6 months unless the default was waived by the mortgagee, who was given the right or an option by the contract of mortgage to disregard it and wait till the expiry of the longer term. The argument addressed to us here is that the contract gave the mortgagee authority, option or liberty to act in either one of the two ways mentioned in the deed on the happening of a certain event, and it was open to him to waive the one and adhere to the other. In other words, it is suggested that the effect of the waiver by the mortgagee authorized by the contract would be not to stop the running of limitation, but to postpone the cause of action or starting of it, till the other default provided for by the deed had taken place. Whatever might be said in favour of the view contended before us, the Full Bench decision in the case of *Shib Dayal v. Meharban* (1), is conclusive on the matter, and we are constrained to hold that despite the authority given by the contract, the operation of the clause which gave an option to the mortgagee for his own benefit could not be waived so as to prevent or postpone the starting of limitation against him.

1925

SHEORAM
SINGH
v.
BABU
SINGHKanhaiya
Lal, J

(1) (1922) I. L. R., 45 All., 27.

1925

SHEORAM
SINGH
v.
BABU
SINGH.

Kanhaiya
Lal. J.

It is argued, however, that the mortgage deed in question is in terms not a mortgage by conditional sale, and that under order XXXIV rule 4, clause (2), the plaintiffs could be given either a decree for foreclosure or for sale within the meaning of article 147 of the Indian Limitation Act, which was introduced for the first time by Act XV of 1877. As observed by their Lordships of the Privy Council in the case of *Vasudeva Mudaliar v. Srinavasa Pillai* (1), suits of the present class were governed, before Act XV of 1877 was passed, by article 132 of Act IX of 1871, which referred to suits for money charged upon immovable property. The language of article 132 has since then been slightly altered. The Limitation Act of 1871 provided a limitation of 60 years for a suit to recover possession of the immovable property mortgaged from the mortgagee, from the date when the right to recover possession accrued. There was no provision in that Act for suits "to redeem" a mortgage other than a mortgage accompanied by possession. By Act XV of 1877 suits against the mortgagee to redeem a mortgage were also provided for, and it is suggested that in order to make the remedies of the mortgagor and the mortgagee co-extensive, a departure was deliberately made, when article 147 was introduced for the first time. Whether this was so or not, the decision of their Lordships in the case of *Vasudeva Mudaliar v. Srinivasa Pillai* (1), and the earlier decision of WILSON and PORTER, JJ., in the case of *Girwar Singh v. Thakur Narain Singh* (2), which they followed, does not leave it any longer open to us to determine how far article 147 of the Limitation Act of 1877 was intended to apply to suits for foreclosure like the present.

(1) (1937) I.L.R., 30 Mad., 426

(2) (1837) I.L.R., 14 Calc., 730.

The learned counsel for the plaintiffs appellants has argued that the mortgage in question is an anomalous mortgage within the meaning of section 98 and not a mortgage by conditional sale, and reading section 67 of the Transfer of Property Act with order XXXIV, rule 4, clause (2), of the Civil Procedure Code, a decree for either foreclosure or sale can be passed in the present case. The mortgage-deed does not purport to provide for the immediate sale of the property conditionally or otherwise. It only provides for the enforcement of the deed by foreclosure at the expiry of the stipulated period, but as observed by their Lordships of the Privy Council in the case of *Thumbuswamy Moodelly v. Hossain Rowthen* (1), the essential characteristic of a mortgage by conditional sale is that on the breach of the condition of repayment, the contract executes itself and the transaction is closed and becomes one of absolute sale to be enforced in a particular manner. Section 58 of the Transfer of Property Act defines a mortgage by conditional sale as a transaction by which the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute. The deed in the present case is not exactly worded in that form; but in substance it adopts that form, and, as pointed out in the case of *Ali Ahmad v. Rahmatullah* (2), such defaults in deeds which are generally executed are intended to operate as deeds of mortgage by conditional sale. Article 147 of the Limitation Act, IX of 1908, cannot, therefore, be applied to the case. The only other question is that of the alleged payments said to have been made towards interest, but the account books produced only go to show that there was a general account between the mortgagor

1925

SHEORAM
SINGH
v.
BABU
SINGHKanhaya
Lal, J

(1) (1878) I.L.R., 1 Mad., 1.

(2) (1892) I.L.R., 14 All., 195.

1925

SHEORAM
SINGH
v.
BABU
SINGH.

and the mortgagee in connection with this deed and certain other advances independently made by the mortgagee, about which an arrangement appears to have been made by the mortgagor to pay the moneys due by instalments of Rs. 400 per year. The account books contain certain entries showing payments made towards these instalments, but they do not show that these payments were made towards interest *as such* due on the deed in suit, and the oral evidence produced on the point to supplement what is not entered in the books cannot be believed. The court below was, therefore, justified in holding that these payments, if made, did not save limitation.

I agree in the order proposed.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Mukerji.

1925
December 2.

GOKUL DAS (PLAINTIFF) v. NATHU (DEFENDANT).*
Civil Procedure Code, section 20—Debtor and creditor—No place fixed for payment—Presumption of law—Duty of debtor to seek creditor.

If there is no special covenant for payment of a debt elsewhere, the presumption of law is that the borrower ought to seek out the lender for payment. *Sri Narain v. Jagannath* (1), referred to. Also *Bangali Mal v. Ganga Ram, Asharfi Lal* (2), cited in argument.

THIS was an application to revise a decision of the Court of Small Causes at Moradabad. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Dr. Kailas Nath Katju, for the applicant.

* Civil Revision No. 118 of 1925.

(1) (1917) 15 A.L.J., 553.

(2) (1922) 71 Indian Cases, 431.

The opposite party was not represented.

1925

MUKERJI, J.—These two applications in revision may be disposed of by the same judgement as the facts are very similar.

GORUL
PAS
T.
NATHU

The applicants who are plaintiffs in two different suits are money-lenders by profession and their practice of money-lending is something like this. They send munims or trusted servants of theirs with money to villages in different districts with instructions to lend money to people who might stand in need of borrowing. It is alleged that the defendants in these two cases borrowed money from the plaintiffs' agents, in one case in the district of Bareilly and in the other in the district of Shahjahanpur. The plaintiffs are residents of the district of Moradabad. The debtors did not pay and thereupon they brought the two suits for recovery of the money at Moradabad.

The defendants did not appear. The plaintiffs' agents who had lent the money in each case went into the witness-box and swore that there was an express agreement by the debtors that they would repay the loans at Moradabad. The agents further produced memoranda made in the account-books of the plaintiffs to the effect that the borrowers had agreed to repay the money at Moradabad.

The learned Judge of the Small Cause Court disbelieved the evidence given to the effect that there was an express agreement to repay the money at Moradabad. The evidence was trustworthy and should have been accepted. He was of opinion that it was not likely to have been the case that the borrowers would come to Moradabad to make payment.

1925

GOKUL
DAS
v.
NATHU.

Evidently the learned Judge thought that the borrowers had agreed to pay at their own homes where the loans were advanced.

Assuming that the evidence that the defendants had agreed to pay at Moradabad was untrustworthy, we have to rely on presumptions of law alone. For there is no evidence to show that the borrowers and the lenders had agreed that repayment would be made only at the borrowers' place. The presumption of law was pointed out in the case quoted by the learned Judge of the Small Cause Court himself, *Sri Narain v. Jagannath* (1) and it is this that in the absence of a contract to the contrary the borrower ought to seek out the lender for payment. The learned Judge was therefore not justified in ignoring the rulings of this Court.

I allow the applications in revision, set aside the decrees of the court below and decree the plaintiffs' claim in each case against the defendants with costs and interest at 6 per cent. per annum from the date of the institution of the suit till recovery.

Application allowed.

(1) (1917) 15 A.L.J., 653.

PRIVY COUNCIL.

LAKHMI CHAND (PLAINTIFF) *v.* ANANDI AND OTHERS
(DEFENDANTS).*

J.C.*
1926
March, 15.

[On Appeal from the High Court at Allahabad.]

Hindu law—Joint family property—Agreement between co-owners—Co-owners executing testamentary document—Validity.

Two brothers, having no male issue, and constituting a joint Hindu family governed by the Mitakshara, signed a document, described therein as an agreement by way of will. The document, which was registered, provided in effect that if either party died without male issue, his widow should take a life interest in a moiety of the whole estate and that if both parties died without male issue, the daughters of each or their male issue should divide the father's share. A few days after the execution of the document one brother died and subsequently the other sued for a declaration that the document was null and void.

Held that the document could not operate as a will; but that, as a co-sharer in a Mitakshara joint family can with the consent of all his co-sharers deal with the share to which he would be entitled on a partition, there was a binding agreement entitling the widow of the deceased brother to a life interest in a moiety. *Lakshman Dada Naik v. Ram Chandra Dada Naik* (1), followed. *Sadabart Prasad Sahu v. Foolbhash Koer* (2), approved.

Judgement of the High Court, (I. L. R. 45 All., 245), affirmed.

APPEAL (No. 5 of 1925) from a decree of the High Court (November 21, 1922) affirming a decree of the Subordinate Judge of Meerut (July 18, 1919).

The suit was brought by the appellant, as the only surviving member of a joint Hindu family governed by the Mitakshara, against the respondent, the widow of his deceased brother Baldeo Sahai, for

* *Present*: Viscount DUNEDIN, Lord BLANESBURGH, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1880) I.L.R., 5 Bom., 48; L.R., (2) (1869) 3 Beng. L.R. (F.B.), 31, 7 I.A., 181.

1926

LAKSHMI
CHAND
v.
ANANDI.

a declaration that a document dated June 5, 1915, executed by himself and that brother was of no effect. Under the document, which was described as an agreement by way of a will, and was registered, the respondent claimed an interest in the half of the joint family property.

The facts appear from the judgement of the Judicial Committee. The trial Judge made a decree dismissing the suit, and that decree was affirmed by the High Court.

The learned Judges (MEARS, C. J. and BANERJI, J.) were of opinion that the document was valid as a joint will, the brothers being the sole members of the joint family; and that in any case it was effectual as a mutual agreement for good consideration, each party giving up the possibility of his surviving the other. The judgement of the High Court is reported at I. L. R., 45 All., 245.

1926. February 15, 16. Sir *George Lowndes K. C.* and *E. B. Raikes* for the appellant: The document of June 5, 1915 was of no effect. A member of a Mitakshara joint family cannot dispose of his interest by will: *Vitla Butten v. Yamenamma* (1) approved by the Privy Council in *Lakshman Dada Naik v. Ram Chandra Dada Naik* (2). There cannot be a joint will which operates as a joint conveyance of joint Hindu property. Reference was made to *Jarman on Wills*, 6th edition, page 41, and *Earl of Darlington v. Pulteney* (3). If the document was a will it was revocable by either party, and was revoked by the appellant. The High Court relied on an observation in the judgement of the Board in *Munshi Indar Sahai v. Kunwar Shiam Bahadur* (4). The observation was, however, *obiter* and there was no discussion as to the law. The record in that case

(1) (1874) 8 Mad. H.C.R., 6.

(2) (1880) I.L.R., 5 Bom., 48; L.R., 7 I.A., 181, 194.

(3) (1775) 1 Cowp. 260, 268.

(4) (1912) 17 C.W.N., 509, 511.

shows that the property was originally self-acquired, and there was an alleged agreement that it should be treated as not being joint property. The judgement in *Suraj Bansi Koer v. Sheo Persad Singh* (1), shows that the power of a member of a joint family to dispose of the share to which he would be entitled on partition is something grafted on Hindu law, and the principle is not to be extended. The document was not effective as a family settlement. Neither party had any share in the property, only a right to partition. Further, the document attempts to create a devolution unknown to Hindu law and is therefore void under the *Tagore* case (2). It attempts not only to give an estate to the widows but also to the daughters and daughters' sons. Hindu law does not recognize property which is partly joint and partly separate. Reference was also made to Mayne's Hindu Law, paras. 424, 563, and (9th edition.) para. 417 and to *Subbarami Reddi v. Ramamma* (3).

1926

LAKHMI
CHAND
P.
ANANDI.

Dunne K. C. and *Dube* for the respondent:—

The document was effective as a family settlement made with the consent of all the co-owners. Not only was the appellant a party to the settlement but effect was given to it by mutation of names. The view upon which the observation in *Munshi Indur Sahai v. Kunwar Shiam Bahadur* (4) was based was correct; it is not conceivable that the point was overlooked. The owners of the complete interest in the property of a Mitakshara joint family can dispose of the whole property *inter vivos*: *Deendyal Lall v. Jugdeep Narain Singh* (5); *Sadabart Prasad Sahu v. Foolbash Koer* (6). In *Subbarami Reddi v. Ramamma* (3) there was no consent.

(1) (1879) I.L.R., 5 Calc., 118; L.R., 6 I.A., 88.

(2) (1872) L. R., I.A., Supp., 47.

(3) (1920) I.L.R., 48 Mad., 824. (4) (1912) 17 C.W.N., 509, 511.

(5) (1877) I.L.R., 3 Calc., 198; L.R., 4 I.A., 247, 252.

(6) (1869) 3 Beng. L. R., (F.R.) 31.

1926

LAKHMI
CHAND
v.
ANANDI.

The decision of the High Court was carefully limited to preserve the right of the widow under the document, and did not preclude other rights which might arise.

Reference was also made to Mayne's Hindu Law, paras. 345, 353, 354.

Sir *George Lowndes K. C.* replied.

March, 25. The judgement of their Lordships was delivered by SIR JOHN EDGE :—

This is an appeal from a decree, dated the 21st November, 1922, of the High Court at Allahabad, which confirmed a decree, dated the 18th July, 1919, of the Subordinate Judge of Meerut by which the suit had been dismissed.

The suit had been instituted in the court of the Subordinate Judge on the 5th June, 1918, and by the plaint in it the three following declarations were claimed :—

(a) The will, dated 5th of June, 1915, and registered on the 9th of June, 1915, executed by the plaintiff and Baldeo Sahai, deceased, on account of its being against the rules of succession under the Hindu Law, is absolutely invalid and null and void and it has no effect upon the right of survivorship of the plaintiff in respect of the estate, business, the zamindari, landed and house properties, etc., of all kinds, belonging to the joint Hindu family.

(b) Defendant No. 1 now has and defendants Nos. 2 to 5 will in future have no right of any kind in respect of the estate, business and zamindari properties, etc., given in relief (a).

(c) The plaintiff is the owner in possession of the entire estate, business and zamindari properties, etc., given in relief (a).

The document in respect of which the declarations are claimed is described in the plaint as a joint will of Baldeo Sahai and the plaintiff Seth Lakhmi

Chand, and is in the written statement of Musammat Anandi, the first and principal defendant, described as an *ekrarnama*, that is, an agreement.

1926

LAKHMI
CHAND
v.
ANANDI

The parties to the document in question were and the parties to the suit are Hindus, by caste Brahman Bohra, subject to the law of the Mitakshara, of the school of Benares. The document in question was written by one Ram Chandar Sahai of Kathauli on stamped paper which had been purchased by Baldeo Sahai on the 5th of June, 1915, and was signed and executed on the same day by Baldeo Sahai and his younger brother Lakhmi Chand, the plaintiff, in the presence of five men who signed the document as witnesses. It was presented for registration on the 8th of June, 1915, at the office of the Sub-Registrar of Jansath, in the district of Muzaffarnagar, by Lakhmi Chand, who having admitted in the presence of the Sub-Registrar the execution and completion of the document, it was registered on the 9th of June, 1915, by the Sub-Registrar.

Baldeo Sahai died on the 10th of June, 1915. He had had by a first wife, who had died before the 5th of June, 1915, a daughter, who was then dead and had left three minor sons who were living on the 5th of June, 1915, and are the defendants 3, 4 and 5. Baldeo Sahai left surviving him his second wife, Musammat Anandi, who is the defendant 1, and an unmarried daughter, who is defendant 2. Baldeo Sahai had no son or other descendant of him. Lakhmi Chand had on the 5th of June, 1915, five daughters living, but no son. Baldeo Sahai and Lakhmi Chand were on the 5th of June, 1915, and until the death of Lakhmi Chand on the 10th of June, 1915, the sole co-sharers in a joint Hindu family. Lakhmi Chand was then over 40 years of age.

1926

LAKHMI
CHAND
v.
ANANTH.

The following is a copy of the document in question :—

“ I, Pandit Baldeo Sahai, first party, and I, Pandit Lakhmi Chand, second party, sons of Pandit Jagram Das, caste Bohra Brahman, residents and raises of qasba Khatauli, district Muzaffarnagar, do declare as follows :—

(1) We, both the parties, are full brothers and are members of a joint Hindu family according to the Hindu Law. We are joint in the business relating to the estate, in zamindari property, field or house property, bonds, mortgage-deeds, notes-of-hand, promissory notes, money-lending business with tenants under account-books, and parole-debts, cash, gold and silver ornaments, conveyances, household goods and paraphernalia of the estate and all other things of every description, of the value of lakhs of rupees.

(2) None of us, the two members of the joint family, has any male issue, but we have female issue and a wife each.

(3) As it has often been seen that disputes and litigations have taken place among persons of property and wealth and their survivors, we, both the parties, in order to avoid future disputes, do, in a sound state of body and mind, of our own accord and free-will, without the instance or instigation of anyone else, make this declaration, which shall be binding on ourselves and our representatives, that in the event of one party dying without any male issue, the name of his widow shall be entered in public papers, that the party remaining alive shall have no objection to the same, that if the surviving party has male issue, in that case, after the death of the widow of the deceased party, the son or the sons of the other party shall be the owner or owners of the entire estate, that the daughters or their sons shall have no right as against the son or sons of the other party, and that the widow of the deceased party shall have no right at any time to make any transfer whatsoever.

(4) The daughters or their male issue shall be entitled to the estate of their father only when both the parties die without any male issue. If any of the parties has any male issue, the female issue or the daughter's sons of any of them shall not get any property whatsoever.

1926

LAKSHMI
CHAND
T.
ANANDI.

(5) The first party has at present an unmarried daughter by his second wife and three minor sons of his deceased daughter by his senior wife, since deceased, who shall be entitled to get equal shares in the estate subject to the conditions given in paragraph No. 4. If the said daughter also, who is at present unmarried, does not give birth to any male issue, then the daughter's sons and not the members of the family of the said (unmarried) daughter's husband, shall be entitled to the whole estate.

(6) I, the second party, have five daughters. They, and in case of the death of any of them, her male issue, shall, subject to the conditions given in paragraph No. 4, be heirs to the estate in equal shares. If any of the daughters die without leaving any male issue, the members of the family of her husband shall have no right, but her share in the estate shall be divided among the remaining daughters and their male issue in order.

(7) If we, both the parties, at any time in our life, divide the estate by our mutual agreement or on account of any dispute, then this document shall not be binding on any party provided none of us has any male issue. If any of us shall have any male issue, he shall be the owner of the entire estate. The widows shall have only life-interest. The daughters, their issue or any other party shall have no right to it.

(8) We, both the parties, have, up to this time, been jointly managing all the estate affairs and shall continue to manage it in the same way, provided no partition takes place. After the death of one party all managements relating to the estate shall be made by the surviving party. The wife of a deceased party shall have no right to get the property partitioned in the life of the other party, but shall continue to get her share of the profit from the other party after deducting the expenses relating to the estate. If the other party evades the payment of the profit, she shall be entitled to seek remedy in court only for recovery of profit.

(9) The residence of us, both the parties, shall be separate in this way that in enclosure No. 65, situate in the abadi of bazar, gasba Khatauli, the party alive shall let the widow of the other party live in any house she might choose, and shall not turn her out of it, but the widow of the said deceased party shall have right of easement and residence only to the

1926

LAKHMI
CHAND
v.
ANANDI.

said house. She shall have no concern with other houses. The party alive shall be at liberty to change the condition of the enclosure or to build a separate house for the female members of his house and take up his abode in it and have any of the houses or shops which exist in that enclosure as his sitting room.

(10) Season fruits such as mango, etc., shall be given by the party alive to the widow of the deceased party to the extent of about one-half (of the produce).

(11) The parties have got this document written after mature deliberation and after having fully understood the contents thereof. They have admitted and accepted the same of their own accord. None of the parties shall have any express or implied objections to this. We have, therefore, executed this agreement by way of a will, in order that it may serve as evidence.

Note :—In the 6th line of the 2nd page of this document, a mark is made and the words, 'situate in the abadi of bazar of qasba Khatauli' are written on the margin."

Signature of Baldeo Sahai, in autograph.

Signature of Lakhmi Chand.

It has been held by the Subordinate Judge and by the High Court in appeal that the document in question was a valid will of the two brothers. Whether it could operate as such will be presently considered.

It is now desirable to consider what was the position on the 5th of June, 1915, before the document in question was executed. The property to which the suit relates was of considerable value; it was valued for the purpose of jurisdiction, as appears by the plaint, at Rs. 1,00,000 (one lakh). Baldeo Sahai was seriously ill and was not expected to recover. If he died as a member of the joint family his widow would be entitled to maintenance only, and the joint family property would vest in Lakhmi Chand by survivorship. If it could lawfully be agreed that the

widow, Musammat Anandi, should on the death of Baldeo Sahai have and enjoy an interest in a moiety of the joint property equivalent to that of the widow of a sonless and separated Hindu, she would on the death of Baldeo Sahai be entitled for life as such widow to a moiety of all the profits of the immovable property, and to a moiety of all the profits of the movable property, which belonged to the joint family. On the 5th of June, 1915, Baldeo Sahai could have separated from Lakhmi Chand by one word and would have been entitled to a partition of all the joint property and if he had separated, his widow, Musammat Anandi, would on his death be entitled for her life as the widow of a sonless and separated Hindu to a Hindu widow's interest in the property, and on her death the property in which she would have a Hindu widow's interest would go to the person entitled to it on her death, who would not necessarily be Lakhmi Chand, or a descendant of him. There was some evidence that before the 5th of June, 1915, Baldeo Sahai was making preparation for a partition, but that need not now be considered, for as the fact was, Baldeo Sahai and Lakhmi Chand did not separate but remained joint until Baldeo Sahai died on the 10th of June, 1915. But that the risk of a partition might at any moment occur and was in the contemplation of Baldeo Sahai and Lakhmi Chand when they executed the document of the 5th of June, 1915, is apparent from a perusal of that document.

It is admitted in the plaint that Baldeo Sahai fell seriously ill and desired "that after his death the name of his widow, defendant No. 1, should be entered in respect of his share in the joint property, and that after the death of the said widow his share in the property should devolve upon his daughter and

1926

LAKHMI
CHAND
v.
ANANDI.

1926

LAKHMI
CHAND
v.
ANANDI.

daughter's sons," and that a document to effect that object should be executed, and that the plaintiff and Baldeo Sahai jointly executed the document in question "by way of a will." Baldeo Sahai could, from a legal point of view, have no interest in the joint property after he died. His interest in the joint property terminated with his life. What was meant by "his share in the joint property" was a moiety of the joint property which he would have had on a partition. After Baldeo Sahai's death Lakhmi Chand entered the name of Musammat Anandi in the revenue papers in respect of a moiety of the zamindari property.

The document in question could not, however, operate as a will. In *Vitla Butten v. Yamenamma* (1), the High Court at Madras held that a will by a member of a joint Hindu family of his co-sharer's interest was not a valid devise. In *Lakshman Dada Naik v. Ram Chandra Dada Naik* (2), the Board, referring to that case, stated that :—

"Its" (the High Court's) "reasons for making distinction between a gift and a devise are that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship resting in them at the moment of his death, there remains nothing upon which the will can operate."

It was held by the Board in *Brijraj Singh v. Sheodan Singh* (3), that a will, which did not operate as a will at all, was good evidence of a family arrangement contemporaneously made and acted upon by all the parties. In the present case their Lordships hold that the document of the 5th of June, 1915, is good evidence of a mutual agreement by Baldeo Sahai and Lakhmi Chand. What interest Musammat Anandi took under that mutual agreement

(1) (1874) 8 Mad. H.C.R., 6.

(2) (1880) I.L.R., 5 Bom., 48, 62; L.R., 7 I.A., 181, 194

(3) (1913) I.L.R., 35 All., 337; L.R., 40 I.A., 161

is the only question which their Lordships need consider.

1926

LAKHVI
CHAND
v.
ANANDI.

It is well established law that a co-sharer in a Mitakshara joint family without having obtained partition can with the consent of all his co-sharers mortgage or charge the share to which he would be entitled on a partition of the joint family property, but the consent of all the co-sharers must be obtained, and as pointed out by Sir JOHN WALLIS, C. J., in *Subbarami Reddi v. Ramamma* (1), a father who is a co-sharer with a minor son cannot give such a consent for his minor son.

Their Lordships have come to the conclusion that the right of a co-sharer in a Mitakshara joint family property, who has obtained the consent of his co-sharers to charge his undivided share for his own separate purposes has long been recognized.

In 1869 in *Sadabart Prasad Sahu v. Foolbash Koer* (2), which related to a Hindu joint family governed by the law of the Mitakshara, Sir BARNES PEACOCK, C.J., in delivering the judgement of a Full Bench of the Calcutta High Court, consisting of himself and KEMP. L. S. JACKSON, MACPHERSON and GLOVER, J.J., held that a member of a joint Hindu family had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint property, in order to raise money on his own account and not for the benefit of the joint family. That implies that with the consent of all his co-sharers a member of a Hindu joint family can grant for his own purposes a valid mortgage of so much of the joint family property as would not exceed his share on partition. That principle that a member of a Hindu joint family can, with the consent

(1) (1920) I.L.R., 43 Mad., 824

(2) (1869) 3 Beng. L.R., 31.

1926

LAKHMI
CHAND
v.
ANANDI.

of his co-sharers, charge for his own purposes the share in the joint family property which would come to him on a partition has been recognized by the Board in *Baijnath Prasad Singh v. Tej Bali Singh* (1), and cannot now be questioned as a principle of Hindu law. It appears to their Lordships that the same principle of the effect of the consent by the co-sharer applies in the present case and that Baldeo Sahai and Lakhmi Chand were competent to agree and did agree that Musammat Anandi should, on the death of Baldeo Singh, have and enjoy for her life an interest in a moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu would have in her deceased husband's estate, and that the interest which she obtained by the mutual agreement of Baldeo Sahai and Lakhmi Chand should continue for her benefit for her life, notwithstanding the birth, if it should happen, of "male issue" to Lakhmi Chand.

Their Lordships will humbly advise His Majesty that plaintiff is not entitled to any of the declarations claimed in the plaint, that the appeal should be dismissed with costs, and that the right of the person or persons who may claim to succeed the defendant Musammat Anandi on her death must be determined, if disputed, when the occasion arises, and not in this suit.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *H. S. L. Polak.*

(1) (1921) I.L.R., 43 All., 228, 244, L.R., 48 I.A., 195, 212.

APPELLATE CRIMINAL.

Before Mr. Justice Dalal and Mr. Justice Boys

EMPEROR *v.* RAFI-UZ-ZAMAN KHAN

AND TWO OTHERS.*

1925
December,
14.

Criminal Procedure Code, section 239—Joint trial—Perjury—Similar statements made by three witnesses in same case with one object—"Same transaction."

At a trial arising out of a communal riot, three witnesses (Muhammadans) gave almost identical, and false, accounts as to the manner in which a certain Muhammadan met his death at the hands of Hindus. Subsequently they were jointly tried for perjury.

Held that, whether or not there was community of purpose in the sense of conspiracy amongst the accused, there was identity of purpose, and the acts of the accused were committed in the course of the same transaction. Having regard, therefore, to section 239 of the Code of Criminal Procedure, their joint trial was not illegal.

In this case three persons who had been witnesses in a case arising out of a communal riot were committed for trial on charges under section 193 of the Indian Penal Code.

The statements made by each of the accused were practically the same and related to the manner in which a certain Muhammadan was killed by Hindus. Though committed separately, the three accused were tried together by the same jury, and were convicted. They appealed to the High Court, and practically the sole ground of appeal was that the trial was illegal inasmuch as there were three separate offences and the accused ought to have been tried separately.

Mr. Muhammad Husain and Mr. Akhtar Husain Khan, for the appellants.

* Criminal Appeal Nos. 747, 748 and 749 of 1925, from orders of D. C. Hunter, Sessions Judge of Allahabad, dated the 31st of August, 1925.

1925

EMPEROR
v.RAFI-UZ-
ZAMAN
KHAN.

The Government Pleader (Mr. *Sankar Saran*),
for the Crown.

Munshi *Shambhu Nath Seth*, for the complainant.

The judgement of the Court (DALAL and BOYS, JJ.), after stating the facts and the manner in which the trial in the court of session had been conducted, thus continued :—

The procedure actually followed by the Judge was clearly adopted in an attempt to save public time and money, and counsel for the appellants has wholly failed to prove, has almost even failed to suggest, that that procedure was protested against in any way whatever or at any stage whatever. There are, however, only two methods provided by law for conducting a trial or trials in such cases as these. Either the trials must be separate if the law requires them to be separate or they may be and ordinarily will be joint, if the law permits them to be joint, unless for some particular reason the learned Judge considers that the trials should be held separately. It is very dangerous and not in accordance with law for a Judge, with the very best intentions, to follow some procedure which is really neither one nor the other of the two procedures provided by law.

* * * * *

We hold that these particular proceedings amounted in effect to a joint trial. A decision in every case of this nature must of necessity depend upon its particular facts.

The next question for decision is whether a joint trial was permissible in this case and the answer to this question depends upon the application of the law to the particular facts. Section 239 of the Code of Criminal Procedure says in the material clauses of

that section : " The following persons may be charged and tried together, namely

- (a) persons accused of the same offence committed in the course of the same transaction;
- (b) persons accused of different offences committed in the course of the same transaction."

1925

EMPEROR
E.
RAFI-UZ-
ZAMAN
KHAN.

It is clear that the accused committed the same offence, namely, an offence in each case under section 193 of the Indian Penal Code. This point has not even been argued by counsel for the appellants and it could not be argued. The only question then that remains is whether these offences were committed in the course of the same transaction. Here again the circumstances in different cases may vary to an infinite degree. In the present case we find three accused persons, witnesses on the same side in a case of communal riot, all giving evidence on the same point and to the same effect, to prove the same fact, viz : the manner in which a certain man met his death. We have no hesitation in holding that this evidence in the case of the three witnesses was given in the course of the same transaction. When the facts are stated as we have above stated them, there is to our minds hardly room for argument. There was the most obvious identity of purpose and that alone *in the circumstances of this case* is, to our minds, sufficient.

We prefer the phrase " identity of purpose " to the phrase " community of purpose." The latter phrase is ambiguous in that it may mean only " identity of purpose " or it may suggest that the purpose of each was not only the same but was known to the others, or in other words, " conspiracy." We do

1925

EMPEROR
v.
RAFI-UZ-
ZAMAN
KHAN.

not consider "conspiracy" in any way a necessary element, though, if it is present, its presence will be a further element supporting a finding that the offences were committed in the same transaction. It is clear that the framers of the Code of Criminal Procedure could never have had in mind the necessity for any proof of conspiracy before the terms of section 239 could be applied. There is nothing requiring any element of conspiracy indicated by section 239. Further, that section has been in the Code for a very large number of years, if not from its actual inception, and certainly long before sections 120A and 120B were added to the Indian Penal Code. We have to look to section 239, and to section 239 only. If the several acts of the accused were committed in the same transaction there is an end of the matter; there can legally and properly be a joint trial.

We may add that much confusion appears to us to have arisen in regard to this type of case owing to a failure to distinguish between different acts of the accused and different transactions. The act of each accused may be wholly independent of the act of the other and in that sense there may be no community whatever; but there may still be community of purpose in the sense of identity of purpose and the acts committed in the same transaction. In this case there cannot be a shadow of a doubt that there was identity of purpose, and further, in the circumstances of this case, no reasonable man could believe that there was not in fact also community of purpose in the sense of a conspiracy or prior consultation. In either view we are satisfied that the offences of the three accused were committed in the same transaction and that therefore under section 239 of the Code of

Criminal Procedure a joint trial was legal. The appellants contend, and we have also held, that in effect the trial was a joint trial.

The appeals, therefore, fail and are dismissed.

Appeals dismissed.

1925
EMPEROR
v.
RAFI-UZ-
ZAMAN
KHAN.

MISCELLANEOUS CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Lindsay.*

1925
December,
18.

BHAGWATI DAYAL (APPLICANT) v. DHAN KUNWAR
AND ANOTHER (OPPOSITE PARTIES).*

*Civil Procedure Code, section 109—Appeal to His Majesty in
Council—Interlocutory order—Test of appealability.*

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties. *Sajjad Ali Khan v. Ishaq Khan* (1), *Shankar Bharati v. Narsinha Bharati* (2) and *Danby v. Tafazzul Husain* (3) referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Maulvi *Iqbal Ahmad* and Munshi *Baleshwari Prasad*, for the appellant.

Babu *Sailanath Mukerji*, for the respondents.

MEARS, C. J. and LINDSAY, J.:—This is an application by Bhagwati Dayal for leave to appeal to His Majesty in Council in consequence of the reversal by this Court of the decision of the Subordinate Judge, who allowed a compromise between the parties.

The plaintiff brought a suit on the allegation that he had been adopted in 1916 by Musammat Dhan Kunwar, defendant, under a verbal authority given by her deceased husband, Salig Ram. Another

* Privy Council Appeal No. 37 of 1925.

(1) (1919) I.L.R., 42 All., 174.

(2) (1922) I.L.R., 47 Bom., 106

(3) (1916) 45 Indian Cases, 290.

1925
BHAGWATI
DAYAL
v.
DHAN
KUNWAR.

defendant who was impleaded was Ajudhia Prasad, he having obtained a mortgage on some of Salig Ram's property. After both the defendants had filed separate written statements denying the alleged adoption the parties were said to have come to a compromise, which was evidenced by a document dated the 6th of August 1923, registered on the 8th of August. In the ordinary course the Subordinate Judge issued a commission for verification of the deed by the pardanashin lady, Musammatt Dhan Kunwar, and she denied any knowledge of the compromise. The learned Subordinate Judge came to the opinion that in point of fact the lady had entered into the compromise well knowing it to be the compromise of the suit and having adequate and proper advice and protection from people who surrounded her. The learned Subordinate Judge therefore passed a decree in the terms of the compromise.

From that order by which the compromise was to be recorded the lady appealed, and a Bench of this Court came to the conclusion that although in fact the thumb impression was that of the lady, the document was not fully explained to her, that she did not understand its nature, nor had she independent advice, and thereupon they set aside the order of the learned Subordinate Judge.

The value of the subject matter of the suit and the value for the purposes of the proposed appeal to His Majesty in Council is in excess of Rs. 10,000; and the contention of Mr. *Iqbal Ahmad*, who appears for the alleged adopted son, Bhagwati Dayal, is that the order of this High Court is appealable to the Privy Council. It happens that there is a decision—*Shankar Bharati v. Narsinha Bharati* (1)—where in fact the exact question arose. SHAH, A. C. J. and

(1) (1922) I.L.R., 47 Bom., 106.

CRUMP, J., came to the conclusion, on slightly different reasonings, that the order by which a court set aside a compromise was an interlocutory and not a final order. Mr. Justice CRUMP said in the course of his judgement:—"All that this order does is to decide that the manner in which the lower court disposed of the suit was incorrect, and that the suit must be disposed of on the merits, and not upon a certain compromise. I cannot see myself that this is in any sense a final order. I take the word "final" to be used in its ordinary sense, and therefore to mean an order which puts to an end a litigation between parties, or at all events disposes so substantially of the matters in issue between them as to leave only subordinate or ancillary matters for decision."

1925

BHAGWAT
DATAI
v.
DHAN
KUNWAR

There is also a decision of this Court in *Sajjad Ali Khan v. Ishaq Khan* (1), in which a Bench, having considered all the authorities and especially having had regard to a decision of the Patna High Court in the case of *G. P. Danby v. Tajazzul Husain* (2), concluded the judgement as follows:—"All of these cases are conveniently grouped up in the Patna decision and there is thus an uniform consensus of opinion that appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties". We think that is the test which ought to be applied and in this case it is obvious that the decision of their Lordships of the Privy Council would, in one event only, finally decide the rights of one party, and in the other it would throw the whole matter open for the trial which has never yet been held upon the merits of the action.

(1) (1919) I.L.R., 42 All., 174.

(2) (1916) 45 Indian Cases, 290.

1925
BHAGWATI
DAYAL
v.
DHAN
KUNWAR.

We are therefore of opinion that this matter is not appealable to His Majesty in Council and this application must be dismissed with costs.

Application dismissed.

REVISIONAL CIVIL.

1926
January, 6.

Before Mr. Justice Daniels.

CHOTEY LAL (PLAINTIFF) v. GIRRAJ KISHORE AND ANOTHER (DEFENDANTS).*

Act No. II of 1899 (Indian Stamp Act), section 40—Hundi—Stamp—Hundi bearing a one anna stamp which has not been cancelled.

A *hundi* which is chargeable with a duty of one anna is not receivable in evidence if the stamp which it bears has not been cancelled, nor can the provisions of section 40 of the Indian Stamp Act, 1899, be called in aid to cure the defect. *Girdhari Das v. Jagan Nath* (1) distinguished.

THIS was an application in revision against a decree of a Court of Small Causes in a suit based upon a *hundi*. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Dr. N. C. Vaish, for the applicant.

Munshi Narain Prasad Ashthana, for the opposite parties.

DANIELS, J. :—The view taken by the court below in this case is correct. The plaintiff sued on a *hundi* bearing a one-anna stamp which was not cancelled. On the case coming before the Judge of the Small Cause Court he held quite rightly that the *hundi* was not receivable in evidence under the provisions of the Stamp Act and he impounded it and sent it to the Collector. The Collector imposed a penalty and

* Civil Revision No. 142 of 1925.
(1) (1880) I.L.R., 3 All., 115.

improperly endorsed the document as sufficiently stamped, presumably purporting to act under section 40 of the Act. Section 40 expressly excludes instruments chargeable with a duty of one anna. The Collector's certificate therefore was not a certificate given in accordance with the provisions of the section, and the conclusive presumption laid down in subsection (2) does not apply to it. I have been pressed with the ruling in *Girdhari Das v. Jagan Nath* (1) but that was a case in which the document was voluntarily brought to the Collector to have the stamp duty appraised under a provision which corresponds to section 31 of the present Stamp Act. The provisions applicable are not identical with those of section 40. It has also been urged that under section 120 of the Negotiable Instruments Act it was not open to the opposite party to contest the validity of the deed, but the condition precedent to the application of section 120 is that there must be a properly stamped bill of exchange before the court, at which the court is entitled to look. An unstamped document, unless it is admissible under some special provision of law, is mere waste paper for the purpose of judicial proceedings. The third plea raised is that the plaintiff ought to have been allowed to sue for the debt independently of the *hundi*, but in this case his cause of action as set out in the plaint was based on the *hundi* and on that alone. I therefore dismiss this application with costs.

Application dismissed.

(1) (1880) I.L.R., 3 All., 115.

1926

CHOTEY
L.
GIRRAJ
KISHORE.

FULL BENCH.

1926
January,
11, 20.

Before Mr. Justice Lindsay, Mr. Justice Sulaiman and
Mr. Justice Mukerji.

CHURYA AND OTHERS (PLAINTIFFS) v. BANESHWAR
(DEFENDANT).*

Civil Procedure Code, order XXII—Abatement—Application to revive suit which has abated—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 171.

The abatement of a suit or an appeal is an automatic process, and in order to work an abatement in either case no order of the court is required. *Gujrati v. Sital Misir* (1) overruled. *Lachmi Narain v. Muhammad Yusuf* (2), approved. *Secretary of State for India in Council v. Jawahir Lal* (3), referred to.

THE facts of this case were as follows :—

A suit was brought for ejectment against three defendants. Baneshwar was defendant No. 3 and was not related to the other defendants. The plaintiffs' case was that they were occupancy tenants of certain plots, that defendants Nos. 1 and 2 were their sub-tenants and that defendant No. 3 was the sub-tenant of the defendants' sub-tenants. The court of first instance dismissed the suit, but on appeal the District Judge decreed the claim on the 23rd of December, 1921. A second appeal to the High Court was preferred by Baneshwar, defendant No. 3, and was allowed, and it was ordered that the memorandum of appeal presented in the court of the District Judge should be returned to the respondent for presentation to the proper court. A Letters Patent Appeal was filed by the plaintiffs against this order. As a matter of fact the defendant Baneshwar had died on the 28th

* Miscellaneous Case No. 255 of 1915.

(1) (1922) I.L.R., 44 All., 459.

(2) (1920) I.L.R., 42 All., 540.

(3) (1914) I.L.R., 36 All., 235.

of February, 1924, while the appeal was pending. but this fact was not brought to the notice of the Bench hearing the Letters Patent Appeal, which allowed the appeal and restored the decree of the District Judge.

1925
CHURYA
BANESHWAR.

When the plaintiffs proceeded to execute their decree against the defendants, including Baneshwar, an objection was filed by the heirs of Baneshwar on the 5th of January, 1925, to the effect that Baneshwar having died before the decision of the Letters Patent Appeal, the decree was not binding on them. The plaintiffs accordingly filed two applications, one praying that the appeal may be declared to have abated as against Baneshwar, the other praying that the appeal might be restored to its original number and the names of his two sons be brought on the record as respondents. Their allegation was that they became aware of the death of Baneshwar only when objections were filed on the 5th of January, 1925, and they made further inquiries in the village. On the other hand the allegation on behalf of the opposite party was that the applicants were fully aware of the death of Baneshwar even long before the 5th of January, 1925.

A preliminary objection to the hearing of these applications was taken that they were barred by time. It was urged that the abatement of the appeal took place on the expiry of 90 days from the 28th of February, 1924, when Baneshwar died, and that no application for setting aside the abatement having been made within 60 days of the said expiry, the present applications were barred by time. On the other hand the learned vakil for the applicants relies on the case of *Gujrati v. Sital Misir* (1) and urges that it was necessary to pass an order of abatement before the appeal could abate, and that, inasmuch as

(1) (1922) I.L.R., 44 All., 459.

1926
CHURYA
v.
BANESH 7/48

no order of abatement has yet been passed, time under article 171 of the Indian Limitation Act has not yet begun to run against them.

The Bench before which these applications were laid, having doubts as to the soundness of the ruling in *Gujrati v. Sital Misir* (1), directed the papers to be laid before the Hon'ble Chief Justice for consideration whether the matter should or should not be referred to a Full Bench. The case was accordingly laid before a Full Bench.

Munshi Shiva Prasad Sinha for Babu Sailanath Mukerji, for the applicants.

Pandit Uma Shankar Bajpai, for the opposite party.

THE following judgements were delivered:—

LINDSAY, J:—This case has been referred to a Full Bench in order to obtain a pronouncement as to whether the case of *Gujrati v. Sital Misir* (1), was rightly decided. This question is connected with the question of the proper interpretation of certain expressions to be found in order XXII of the Code of Civil Procedure.

That order deals with what is to happen to suits in cases of the death, marriage and insolvency of parties, and in general terms the order declares that on the happening of certain events the suit abates. This procedure is also made applicable to appeals by virtue of rule 11 of order XXII, so that, under the order in question it is possible for either a suit or an appeal to abate.

When a suit or appeal abates under the order, rule 9 lays down a procedure by way of revivor, and if that procedure is followed the suit or appeal which has abated and, so to speak, become dead is revived.

(1) (1922) I.L.R., 44 All., 459.

The question upon which there has been a considerable difference of judicial opinion in this Court is whether, before a suit abates, it is necessary for the court to pass what has been called an order for abatement, that is to say, the question is whether a suit abates automatically or whether in order to bring about abatement it is necessary that the court should pass an order to that effect.

1926
CHURYA
v.
BANESHWAR.

Lindsay, J.

It seems to me on a study of the language of order XXII that it is impossible to contend that there is any need for a court to pass what is called an order for abatement; for, in my opinion, abatement is an automatic proceeding and results from the happening of certain events which are mentioned in order XXII.

That was the view which was taken also by Mr. Justice WALSH in the case of *Lachmi Narain v. Muhammad Yusuf* (1).

It seems, however, that this judgement was overruled by the Bench decision which we are now considering, namely, the decision in I.L.R., 44 All. 459. There two learned Judges of this Court said as follows at page 461 of the report :—

“ It seems to us that the point is concluded by the decision in *Secretary of State for India v. Jawahir Lal* (2), and we think that that decision was correct. In order XXII, rule 9 (2), it is stated that the plaintiff may apply for an order to set aside the abatement or dismissal. It is quite obvious that a suit cannot be dismissed automatically. It seems to us, therefore, that a formal order declaring that a suit or appeal has abated is necessary before an application under this rule can be entertained.”

All I can say is that with great respect I am unable to follow the opinion of the two learned Judges. It is certainly true that there can be no automatic dismissal of a suit under order XXII. The only

(1) (1920) I.L.R., 42 A.M., 540.

(2) (1914) I.L.R., 36 All., 235.

1926
CHURYA
v.
BANESHWAR.

Lindsay, J.

provision for dismissal of a suit under this order is to be found in rule 8(2). The case which is there contemplated is one in which the plaintiff has become insolvent, and under rule 8(2) the defendant may apply to the court for the dismissal of the suit on the ground of the plaintiff's insolvency. On that application being made the court may make an order dismissing the suit. Quite clearly there can be no automatic dismissal, for, as has just been pointed out, this dismissal must result from an application made by the defendant. But it does not follow that, because a suit may not be dismissed automatically, the suit does not abate automatically. On the contrary, it seems clear in every way that abatement in the case of a suit or appeal is an automatic proceeding and that for the purpose of producing what is described as the condition of abatement no order of the court is necessary. It does indeed happen in practice that courts do declare that a suit or appeal has abated, but in making this declaration they are merely recording a fact which has happened in law and the abatement does not result in any way from the making of the order. The order is merely a declaration of an existing fact.

With regard to the case of *Secretary of State for India in Council v. Jawahir Lal* (1), which is cited as an authority by the learned Judges who decided the case reported in I. L. R., 44 All., referred to above, I am of opinion that this decision does not lay down that it is necessary that the court should pass a formal order to bring about the abatement of a suit or appeal. It is quite true that certain expressions in the judgment in that case as also in the referring order might lead one to suppose that the making of a formal order was necessary. For example, in the referring order of PIGGOTT, J., we find the following:—"An order

(1) (1914) I.L.R., 36 All., 235.

for the abatement of the appeal would certainly follow automatically upon an order rejecting the present application." Again in disposing of the case the two learned Judges who decided the reference say that "he may, after the order of abatement has been passed, apply to have it set aside on the ground that he was prevented by any sufficient cause from continuing the suit." These expressions, as I say, might indicate that the passing of an order for abatement was legally necessary. On the other hand, it would appear from another passage in the judgement that the learned Judges were not of the opinion that such an order was required, for they say at page 238 of the report as follows:—"Therefore, as the law now stands, since no application was made under sub-rule (1) within the time allowed by law, the appeal must abate."

1926

CHURYA

v.

BANESHWAR.

Lindsay, J.

However that may be, it seems to me perfectly clear that the abatement of a suit or appeal is an automatic process and that in order to work an abatement in either case no order of the court is required.

Some of the confusion which has attended the discussion of this question has probably arisen from the fact that under the Code of Civil Procedure, Act No. XIV of 1882, there were certain sections which declared that an order for abatement of a suit might be passed by the court. I may refer in this connection to section 366 of Act No. XIV of 1882. Section 371 also provided certain procedure by which an order for abatement could be set aside. It is also pertinent to notice in this connection that, under the Limitation Act of 1877, article 171 provided a period of sixty days for applications made under section 371 of the Code of Civil Procedure for an order "to set aside an order for abatement," and the period of sixty days was declared to begin to run from the date of

1926

CHURYA
v.
BANESHWAR

the order for abatement or dismissal. This period of limitation was obviously so framed because of the language of section 371, which, as I have already said, provided for the setting aside of an order for abatement.

If we turn now to Act No. IX of 1908, which was passed in the same year as the present Code of Civil Procedure, we find that article 171 is couched in different language. The article provides a period of sixty days for an application under the Code of Civil Procedure, 1908, for an order to set aside an abatement (not to set aside an order for abatement), and the period of sixty days begins to run not from the date of any order of abatement but from the date of the abatement.

I am satisfied, therefore, that the decision in I.L.R., 44 All., 459, is not a correct decision and ought to be overruled. In my opinion the correct law was laid down in the judgement above referred to, which is reported in I. L. R., 42 All., 540. The true interpretation of order XXII is that in order to work the abatement of a suit or appeal it is not necessary for the court to pass any order.

SULAIMAN, J :—I fully agree. I would add that, according to the English practice (Order 17, rule 9), where any cause or matter "becomes abated," the solicitor for the plaintiff or person having the conduct of the cause or matter merely certifies the fact to the proper officer, who causes an entry thereof to be made in the Cause Book opposite to the name of such cause or matter.

MUKERJI, J :—I entirely agree. As an additional reason I would refer to the provision contained in sub-rule (3) of order XXII, rule 9.

BY THE COURT.—The case can now be sent back again to the learned Judges who referred the above matter to this Bench for opinion

1925
CHURTA
C.
BANESHWAR

On the return of the case, the following order was passed :—

SUBAIDMAN and MUKERJI, JJ. :—The Full Bench having decided that an application for setting aside an abatement must be made within the period of sixty days from the actual abatement, and not from the passing of an order declaring the abatement, we have to consider the application for substitution of names, on the merits. It is admitted that Baneshwar died on the 28th of February, 1924. The applicants' case is that they came to know of the death on the 5th of January, 1925. The question is, admitting this date to be true, whether they acted diligently in coming before this Court with the application for substitution. The period allowed for an application for substitution is ninety days and the present application is beyond time, even if this period of ninety days is computed from the date of knowledge, namely the 5th of January, 1925. In the circumstances, we do not think that there was any diligence on the part of the plaintiffs appellants.

We declare that the Letters Patent Appeal has abated. We set aside the order allowing the appeal and instead give the declaration aforesaid. We make no order as to costs.

Order set aside.

REVISIONAL CIVIL.

1925
December,
3.

Before Mr. Justice Daniels.

GANGAI DHAR, BAIJNATH (OPPOSITE PARTY) v. BOMBAY, BARODA AND CENTRAL INDIA RAILWAY (APPLICANT).*

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 17—Application to set aside an *ex parte* decree—Deposit not made in time owing to closing of treasury.

An application under section 17 of the Provincial Small Cause Courts Act was presented on the last day of limitation accompanied by the necessary deposit. Owing, however, to the local treasury closing earlier than the hour when the tender was made the money was not paid in that day, but the next. *Held* that this was a sufficient compliance with the provisions of the section. *Munna Lal v. Radha Kishan* (1), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Dr. N. C. Vaish, for the applicant.

The opposite party was not represented.

DANIELS, J.—This is a revision under section 25 of the Provincial Small Cause Courts Act. The question raised is whether there was a sufficient compliance with section 17 of that Act in presenting an application to set aside an *ex parte* decree. The application was presented on the last day of limitation at about 3 o'clock. It would appear from the judgement of the court below that it was accompanied by a tender of the amount payable under section 17. but as no payments are passed by the treasury after 12 o'clock in the day, the tender was not returned to the applicant or the money actually deposited in the treasury till the following day. I agree with the court below that this was a substantial compliance with

* Civil Revision No. 121 of 1925.
(1) (1915) I.L.R., 37 All., 591.

the provisions of section 17. The applicant did everything that was possible for him to deposit the money at the time of presenting the application, and it was only owing to the particular rules in force of the local treasury that it could not be deposited till next day. The principle of the ruling in *Munna Lal v. Radha Kishan* (1), relied on by the court below is applicable. I accordingly dismiss the revision, but without costs as the respondent is unrepresented.

Revision dismissed.

APPELLATE CIVIL.

Before Mr. Justice Dalal and Mr. Justice Boys.

ALLAHABAD BANK LTD., BAREILLY (DECREE-HOLDER)
r. BHAGWAN DAS JOHARI AND OTHERS (JUDGMENT-DEBTOR).*

Act No. V of 1920 (*Provincial Insolvency Act*), section 28—
Joint Hindu family—Father declared insolvent—Decree against father and sons prior to adjudication—What property vested in receiver—Execution of decree.

On an adjudication of a Hindu father as an insolvent under the Provincial Insolvency Act, 1920, the interest of the sons in the joint family property does not become vested in the receiver. *Sat Narain v. Behari Lal* (2), followed.

THE facts of this case are fully set forth in the judgement of the Court.

Dr. Karlas Nath Katju, for the appellant.

Mr. B. Malik (for Dr. Surendra Nath Sen), for the respondents.

DALAL and BOYS, JJ. :—This is an appeal by a decree-holder, the Allahabad Bank Ltd., Bareilly, against an order of the Subordinate Judge of Bareilly, dated the 24th of February, 1925. The order does not

* First Appeal No. 205 of 1925, from a decree of C. Deb Banerji, Subordinate Judge of Bareilly, dated the 24th of February, 1925.

(1) (1915) I.L.R., 37 All., 591.

(2) (1925) I.L.R., 6 Lab., 1.

1925

GANGA
DEAR,
BAINNATH
v.
BOMBAY,
BARODA
AND
CENTRAL
INDIA
RAILWAY.

1925
December,
11.

1925

ALLAHABAD
BANK
LTD.,
PARBILLY
v.
BHAGWAN
DAS
JOHARI.

contain the facts of the case which must therefore be narrated here. The decree-holder had obtained a decree against one Banke Lal and his four sons on the 31st of January, 1924. An application for execution was presented on the 8th of May, 1924, and the property of the whole family was attached and proceedings were being taken for sale of the property. Before a sale took place, Banke Lal alone was adjudged an insolvent by the insolvency court which appointed a receiver for his property. His property thereupon vested in the receiver. On the 7th of December, 1924, subsequent to the insolvency proceedings, the pleader for the Bank requested the lower court that the father's one-fifth share may be released and only four-fifths of the attached property may be sold. The court passed an order accordingly. On the 26th of January, 1925, two sons of Banke Lal applied that the entire property of the family may be sold by the receiver appointed by the insolvency court. There was no suggestion that the entire property had vested in the receiver upon an adjudication in favour of the father. On this application the lower court passed an order, with the terms of which we do not agree. The learned Subordinate Judge directed that copies of the application and of the order of the court may be sent to the receiver in insolvency to take steps accordingly and to act as if the entire family property were the assets of the insolvent. This order was not justified because on an adjudication of a Hindu father as an insolvent under the Insolvency Act the joint property of the family does not at once vest in the assignee. Their Lordships enunciated this proposition of law in the case of *Sat Narain v. Behari Lal* (1), where the terms construed were those of the Presidency Towns Insolvency Act (No. III of 1909). The

(1) (1924) I.L.R., 6 Lah., 1.

term "property" is defined in the Provincial Insolvency Act in the same words: Section 2(d) of Act No. V of 1920. That pronouncement of their Lordships will, therefore, cover the present case also.

On the 6th of February, 1925, the receiver of the insolvency court, Babu Johari, applied that he might be permitted to carry out the sale of the entire family property and on this application the lower court ordered that sale proceedings through the Amin and the Collector should be stopped and that the whole property should be sold by the receiver, in whom, according to the court, the entire property had vested. The decree-holder was informed of this order. Eighteen days later, on the 24th of February, the learned Judge ordered the execution case to be struck off. This is the order under appeal. It is in the following terms:—"Banke Lal judgement-debtor has been declared an insolvent. His property together with the whole of the family property will be sold through the receiver."

The mere words of this order as quoted above are not objectionable, as the lower court would be well advised to have the sale of the sons' interest and of the father's interest in the joint family property carried out by the same agency. The previous orders of the lower court, however, indicate that, according to its opinion, all the assets have vested in the receiver. Such a finding will obviously be prejudicial to the decree-holder, because, if the assets are all vested in the receiver, the other creditors will claim rateable shares in the shares of the sons in the joint family property and, so far, that portion of the property of the sons will not be available to the decree-holder appellant.

We set aside the order of the 24th of February, 1925, and direct the lower court to proceed according

1925

ALLAHABAD
BANK
LTD.,
BAREILLY
v.
BHAGWAN
DAS
JOHARI.

1925

ALLAHABAD
BANK
LTD.,
BAREILLY
v.
BHAGWAN
DAS
JOHARI.

to law. We have already indicated that the insolvency of the father does not vest the interest of the sons in the joint family property in the receiver. Whatever interest the sons may have in the property will be available to the decree-holder appellant to satisfy his decree of the 31st of January, 1924, which was specifically against the sons as well as against the father. We think that the proper procedure in the case would be to carry out execution proceedings in combination with the receiver in insolvency and arrange so that the entire property both of the father and of the sons may be sold at the same time. It appears that part of the immovable property is house property which could be sold by the lower court directly and part is revenue paying property which will have to be sold through the Collector of the district. There ought to be no difficulty about the sale of the shares of the sons in the house property being carried out at the same time that the share of the father is sold. The lower court may appoint the receiver in insolvency sale officer for the house property and when the property is sold the receiver under the direction of the lower court and independently of the insolvency court will deposit four-fifths of the sale amount in the lower court for the benefit of the decree-holder appellant. There will be some difficulty in selling the share of the sons in the revenue paying property along with the share of the father. It may be found possible by the lower court to advise the Collector at the time of the sale that the sale by him may take place at the same time that the father's share is sold. If any other arrangement of joint sale suggests itself to the lower court and is acceptable to the parties, it may be adopted.

The respondents were not represented to-day and the appeal was heard *ex parte*. The appellant shall receive his costs here.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.
JAGRUP SINGH (PLAINTIFF) v. INDRASAN PANDE AND
OTHERS (DEFENDANTS).*

1925
December,
11.

Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 12, sub-section (3)—Pre-emption—"Person claiming pre-emption"—Vendee.

Where there are more persons than one of the same class claiming pre-emption, the vendee is "a person claiming pre-emption" within the meaning of section 12, sub-section (3) of the Agra Pre-emption Act, 1922. *Ishwar Dat Upadhiya v. Mahesh Dat Upadhiya* (1), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondents.

WALSH and KANHAIYA LAL, JJ. :—This appeal raises a simple question of law on the construction of section 12, sub-section (3) of the new Pre-emption Act. That question is this. The sub-section providing that in a case "where there are more persons than one of the same class claiming pre-emption," is the vendee, or proposed vendee, or contemplated vendee, or intended vendee, "a person claiming pre-emption" within the meaning of the section? In *Ishwar Dat Upadhiya v. Mahesh Dat Upadhiya* (1) a Bench of this Court, including one member of the Court now sitting, decided that question in the affirmative. It is important in connection with the new Act that the decisions of this Court should be consistent. In that case the respondents were unrepresented. But in this case the respondents have had the advantage of Dr. *Sen* to represent them and we do not think that anything could

* Second Appeal No. 1628 of 1924, from a decree of Krishna Das, Additional Subordinate Judge of Azamgarh, dated the 30th of July, 1924, confirming a decree of Kaustubha Nand Joshi, Munshi of Muhammadabad Gohna, dated the 31st of March, 1924.

(1) (1925) I.L.R., 47 All., 910.

1925

JAGRUP
SINGH
v
INDRASAN
PANDE.

be said on behalf of the other view which has not already been said. We agree with the decision on this further ground. The ordinary meaning of "to pre-empt" is to purchase in preference to others, and pre-emption is the effect of the purchase. The vendee, if he is successful, does in fact pre-empt and is, therefore, properly spoken of as a person claiming pre-emption. Whereas "the right of pre-emption" is spoken of in other parts of the Act, in this particular sub-section the word used with reference to what is being claimed is simply pre-emption. We are further of opinion that this interpretation satisfies another test, namely, the true construction of section 10 where it is quite obvious that the expression "equal" or "inferior" right of pre-emption is used with reference to the vendee. It has been found that the plaintiff is related to one of the vendors and the husband of the other vendor within four degrees. The *wajib-ul-arz* filed shows that the property in question was obtained by one of the vendors and the husband of the other vendor from their fathers, respectively, who were own brothers. The appeal must be allowed and the suit decreed.

Appeal allowed.

MISCELLANEOUS CIVIL.

1925
December,
23.

Before Mr. Justice Dalal and Mr. Justice Boys.

CHITAR MAL (PLAINTIFF) v. PANCHU LAL AND OTHERS
(DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), section 7; schedule I, article 144—Adverse possession—Idol—Alienation of property belonging to an idol.

An idol is under no disability of the kind referred to in section 7 of the Indian Limitation Act, 1908; and if property

* Miscellaneous Case No. 668 of 1925.

belonging to it be alienated by the manager, adverse possession runs against the idol just as against any other person. *Damodar Das v. Lakhan Das* (1) and *Jagadindra Nath Roy v. Hemanta Kumari* (2), referred to.

1925
CHITAR
MAL
v.
PANCHU
LAL.

THE facts of this case were as follows :—

Two brothers, Ram Narain and Jai Narain owned a house in a street in Ajmere in equal shares. Jai Narain made a gift of his share on the 9th of January, 1903, to the idol of Shri Chaturbhujji Maharaj installed in a temple in Ajmere. Under the deed of endowment he gave directions as to the use to be made of the income derived from the rent of half the house. The defendant Musammat Bishni is widow of a son of Ram Narain. On the 17th of April, 1905, the managers of the temple sold the gifted portion of the house to Musammat Bishni. On the 5th of December, 1918, plaintiff, son of Jai Narain who was dead at the time, sued for a declaration that the property in suit consisting of half the house formerly owned by his father was trust property; that the transfer of the said property to Musammat Bishni and her adopted son Panchu was null and void and that the property might be made over to the trustees of the temple of Shri Chaturbhujji after dispossession of the two defendants Nos. 1 and 2.

The defendants were Musammat Bishni, her adopted son Panchu and 11 other persons of the Agarwal-Marwari community of Ajmere who are described in the plaint as " panchas " of the Biradri (brotherhood) of the Agarwal-Marwaris of Ajmere. The allegation in the plaint of transfer to both Musammat Bishni and her adopted son was incorrect. The sale was made in favour of Musammat Bishni alone, the adoption having taken place subsequent to the date of sale.

(1) (1910) I.L.R., 37 Calc., 585.

(2) (1904) 31 I.A., 203.

1925

GHITAR
MAL
v.
PANCHU
LAL.

The suit was instituted more than 12 years after the date of sale, so it was pleaded in paragraph 11 of the plaint that under the provisions of section 10 of the Limitation Act the bar of limitation was saved. This plea was decided against the plaintiff and the reference to us does not cover that point.

The plaintiff, having lost his case in two Courts in Ajmere, asked for a reference to the High Court under section 17 of the Ajmere Courts Regulation, No. I of 1877.

On this reference—

Dr. *Surendra Nath Sen*, for the applicant.

Dr. *M. L. Agarwala* and *Munshi Panna Lal*, for the opposite parties.

The judgement of the Court (DALAL and BOYS, JJ.), after setting forth the facts, thus proceeded :

The statement submitted by the learned Additional District Judge has referred to us the following questions for decision :—

(1) Whether the deed, dated the 17th of April, 1905, could constitute an alienation of the dedicated property (waqf) which was under the management of the Marwari faction of the *biradri* of Agarwals at Ajmere and thereby give rise to adverse possession.

(2) Whether respondent No. 1 could acquire any title to the said property.

(3) Whether in the circumstances of the present case respondent No. 1 could claim the benefit of the law of limitation, especially in view of paragraphs 1 and 2 of the written statement.

We shall take up issue No. 2 first, according to the sequence in which the case was argued by the plaintiff's learned counsel Dr. *Sen*. He argued that an idol suffered the disability of perpetual minority,

so any suit by an idol at any period of time after the date of the transfer would be saved from the bar of limitation under the provisions of section 7 of the Limitation Act. He based his argument on a tentative opinion put forward by the learned author of a treatise on Hindu Law (Sastri's Hindu Law). At page 726, Chapter XIV of his book, 5th edition, the present editor of the book has made the suggestion in the following words :—

“ As regards limitation it should be considered whether section 7 of the Limitation Act is not applicable to a suit to set aside an improper alienation by a sebaite of the property belonging to a Hindu god. As the god is incapable of managing his property he should be deemed a perpetual minor for the purpose of limitation.”

We were not referred to any ruling where this opinion may have been followed. With respect, it may be pointed out that in a transfer by a minor the question of a proper or improper alienation would not arise. Under the Contract Act a transfer by a minor would be void and not only voidable : *Mohori Bibee v. Dharmodas Ghose* (1). If the rule were enforced the property of a god would not fetch any money in the market when need arose to transfer it for the benefit of the temple where the idol may be installed. The learned editor himself has quoted in the book a pronouncement of their Lordships of the Privy Council in conflict with this view. *Jagadindra Nath Roy v. Hemanta Kumari* (2). In that case a suit for possession was brought by a sebaite of an idol and the High Court of Calcutta held that the idol being a juridical person, capable as such of holding property, limitation started running against him from the date

1925

CHITAP
MAL
v.
PANCHU
LAL.

(1) (1902) I.L.R., 30 Cal., 539.

(2) (1904) 31 I.A., 203.

1925

CHITAR
MAL
v.
PANCHU
LAL.

of the transfer and so the suit by the sebaity was time-barred. Their Lordships accepted this view as probably the true legal view when the dedication is of the completest kind known to the law (page 209, paragraph 3). They, however, held that limitation was saved because when the cause of action arose the sebaity, to whom the possession and management of the dedicated property belonged, was a minor. So the right to bring a suit for the protection of the property was at the time vested in a minor and such a suit could be brought within three years of the majority of the sebaity in whom the right to sue had been vested. This is clear authority for holding that the idol was not considered by their Lordships to be a minor in perpetuity. In a later ruling this point is made more clear. That ruling is also quoted by the editor of Sastri's Hindu Law with great fairness: *Damodar v. Lakhan Das* (1). The senior chela and rightful mahant of a math transferred half the property of the math to another chela. When the senior chela was succeeded by his disciple, the latter brought a suit for recovery of possession against the chela to whom his predecessor had transferred half the property. The suit was brought 12 years after the transfer and was held by their Lordships to be time-barred. They observed: "The learned Judges of the High Court have rightly held that in point of law the property dealt with by the *ekrarnama* was prior to its date to be regarded as vested not in the mahant, but in the legal entity, the idol, the mahant being only his representative and manager. And it follows from this that the learned Judges were further right in holding that from the date of the *ekrarnama* the possession of the junior chela by virtue of the terms of that *ekrarnama* was adverse to the right of the idol and of the

(1) (1910) I.L.R., 37 Cal., 885.

senior chela as representing that idol and that therefore the present suit was barred by limitation." (page 894). We have clear authority, therefore, in refusing to accept the plaintiff's argument.

[The judgement then proceeded to deal with the other two issues which are not material for the purpose of this report.]

For these reasons our answers to the questions put to us by the learned Additional Judge are :—

(1) That the transfer of the 17th of April, 1905. was an alienation which started adverse possession in favour of Musammat Bishni.

(2) That Musammat Bishni could acquire title to the property under the deed and by adverse possession.

(3) That by her admission of paragraphs 1 and 2 of the plaint Musammat Bishni was not estopped from putting forward a plea of limitation.

A copy of this judgement shall be sent to the court which made this submission and the costs consequent on the reference here shall be costs in the appeal out of which the reference arose. The costs will be payable by the plaintiff.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Lindsay.

1925
January,
4.

JAI NARAIN (DEFENDANT) *v.* JAFAR BEG AND ANOTHER
(PLAINTIFFS).*

Acquiescence—Equitable doctrine of—Building on the land of another—Circumstances disentitling owner to claim demolition.

In order that the protection of the equitable doctrine of acquiescence may be successfully claimed, the following circumstances must subsist :—

The party claiming the benefit of the doctrine must have made a mistake as to his legal rights and must have

* Appeal No. 90 of 1924, under section 10 of the Letters Patent

1926

JAI
NARAIN
v.
JAFAR
BEG.

expended some money or done some act on the faith of his mistaken belief; and the possessor of the legal right must have known of the existence of his own right which is inconsistent with the right claimed by the other party, he must have known of the other party's mistaken belief in his own rights, and he must have encouraged the other party in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. *Willmott v. Barber* (1), followed.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court. The facts of the case were as follows :—

The plaintiffs came into court alleging that the defendant had trespassed on a small portion of land belonging to them and had erected a building thereon. The suit was filed in the month of November, 1918, and the allegation in the plaint was that the defendant had begun to erect the building during the civil court vacation, which, in the year 1918, lasted from the 20th of September to the 19th of October. The plaintiffs prayed for the ejectment of the defendant and for the demolition of the building which he had erected. The defence was that the land in suit was the property of the defendant and not of the plaintiffs, and a further plea was taken that the claim of the plaintiffs was barred on the principle of "tacit acquiescence and waiver."

The court of first instance found that the title to the land in suit was clearly with the plaintiffs and that the defendant had no title at all. But it refused to order demolition upon the ground that the construction was already complete. The plaintiffs appealed, but without success. They then came in second appeal to the High Court, and this appeal was decreed by a single Judge of the Court upon the main ground that the courts below had not given any sufficient reasons

for refusing an order for demolition. The defendant preferred the present appeal under section 10 of the Letters Patent.

1923

JAI
NABAIN
C.
JAFAR
BEG.

Babu *Lalit Mohan Banerji*, for the appellant.

Babu *Saila Nath Mukerji* and Munshi *Baleshwari Prasad*, for the respondents.

THE judgement of the Court (MEARS, C.J., and LINDSAY, J.), after stating the facts as above, thus proceeded:—

After hearing the arguments of counsel, we think the learned Judge of this Court was quite right. The law on the subject of equitable estoppel has been expounded in the case of *Willmott v. Barber* (1). In dealing with the subject of acquiescence, FRY, J., observed as follows at page 105 of the report:—

“ It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other

(1) (1880) L.R., 15 Ch. D., 96.

1926

JAI
NARAIN
v.
JAFAR
BEG

acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgement, nothing short of this will do."

Applying these principles to the case now before us, no case has been made out by either of the courts below for refusing the plaintiffs demolition of the construction. It has been argued that the defendant appellant was under a mistaken belief that the land in dispute belonged to him. Even assuming that, the defendant would still not be entitled to succeed in this appeal, for it would be necessary for him to establish the other matters referred to in the judgement of FRY, J. From the judgement of the courts below, however, it does not appear to us that the defendant appellant could have entertained any *bonâ fide* belief that he was the owner of the land in question.

We are of opinion that the appeal fails and we dismiss it accordingly with costs.

Appeal dismissed.

[N.B.—It may be noted that "fraud," as used by an Equity Judge, means "against good conscience" rather than fraud in the criminal, or colloquial, sense.—ED.]

REVISIONAL CIVIL.

1926
January,
19.

Before Mr. Justice Dalal and Mr. Justice Boys.
HARNAND LAL (PLAINTIFF) v. CHATURBHUI (DEFENDANT).*

Civil Procedure Code, sections 115, 151; order XXXII, rule 15—Order refusing to stay proceedings—Revision—"Inherent powers of court"—Avoidance of multiplicity of proceedings.

During the pendency, in the court of a Subordinate Judge, of a suit for specific performance, the defendant's

* Civil Revision No. 125 of 1925.

1926

HARNAND
LAL
v.
CHATURBHUI

counsel informed the court that proceedings in lunacy were going on in the court of the District Judge with reference to the defendant. The plaintiff applied to the Subordinate Judge to stay proceedings until the question of the defendant's mental condition had been determined by the District Judge, but the application was refused.

Held, on application by the plaintiff to the High Court, that, although no revision lay, the case was a fit one for the exercise of the inherent powers of the Court, and a stay was granted. *Buddhu Lal v. Meera Ram* (1) and *Joti Shih Prakash v. Jhinguria* (2), referred to.

THE facts of this case were as follows:—

There was a suit for specific performance pending in the court of the Second Subordinate Judge of Cawnpore. The defendant's son-in-law (referred to in the judgement as "Chaturbhuj junior") applied to the Subordinate Judge under order XXXII, rule 15, of the Code of Civil Procedure, praying that a guardian *ad litem* might be appointed for the defendant upon the ground that he was of weak mind. Some evidence was taken, when, on the 4th of September, 1925, the vakil for the defendant informed the court that lunacy proceedings were going on in the court of the District Judge of Mainpuri with reference to the mental condition of the defendant.

A week later the plaintiff asked the Subordinate Judge to adjourn the proceedings in his court until a decision in the lunacy proceedings had been arrived at. This application was refused. Subsequently to this refusal the plaintiff successfully applied to the District Judge of Mainpuri to be made a party to the lunacy proceedings. The plaintiff then applied to the High Court asking that the Subordinate Judge's order might be set aside and the proceedings in his court stayed.

(1) (1921) I.L.R., 43 All., 564.

(2) (1923) I.L.R., 46 All., 144.

1926

HARNAND
LAL
v.
CHATURBHUI.

On this application—

Babu *Piari Lal Banerji*, for the applicant.

Dr. *Surendra Nath Sen*, for the opposite party.

The judgement of the Court (DALAL and BOYS, JJ.), after stating the facts as above, thus continued :—

It is of course obvious that if the District Judge finds Chaturbhuj defendant to be of sound mind for the purposes of the proceedings before him, the learned Subordinate Judge will have in that case to proceed with and finally determine the question of the mental fitness of the defendant within the meaning of order XXXII, rule 15. It is equally obvious that if the District Judge finds the defendant to be a lunatic, that finding will conclude the question at present pending before the Subordinate Judge. Counsel for Chaturbhuj junior before us is unable to suggest any prejudice whatever that his client or Chaturbhuj defendant will suffer by a stay of the proceedings in the court of the Subordinate Judge, even if eventually the lunacy of the defendant be not established in the court of the District Judge. There should at the most be a very brief delay while the District Judge completes the inquiry necessary for the proceedings before him. On the other hand it is manifest that to continue the proceedings before the Subordinate Judge, when the result of the proceedings before the District Judge may show them to have been already unnecessary, is most undesirable. Such a course would manifestly infringe the principle that this Court and every other court should avoid as far as possible multiplicity of proceedings in the same matter. It is further pertinently urged on behalf of the plaintiff before us that the evidence

which he will require to produce before the Subordinate Judge and before the District Judge is practically the same and that it is impossible for him to be taking his witnesses backwards and forwards to two different courts in the same matter. We think that these facts only require to be stated to indicate forcibly that it is desirable that the proceedings in the court of the Subordinate Judge should be stayed.

The only question that it has been possible for counsel for the opposite party here to urge seriously is that this Court has no power to stay the proceedings. The plaintiff, applicant here, did not justify his right to apply to this Court by a reference to any enactment in the title of his application. It has since been entitled an application under section 115 of the Code of Civil Procedure, in response, as we are informed by counsel for the applicant, to a suggestion from the learned Judge before whom this case first came. For the opposite party it is contended that the case is not one in which this Court can interfere on the revisional side under section 115 and he relies on the decision of the Full Bench in *Buddhu Lal v. Mewa Ram* (1). We think that this contention, in the particular circumstances in which this order of refusal to stay was passed, must be accepted. Counsel for the plaintiff applicant then fell back on the provisions of section 151 of the Code of Civil Procedure and of section 107 of the Government of India Act. In the view that we take it will be unnecessary for us to consider the latter section.

It is a common practice to speak of "the power given to the court by section 151 to make orders, etc." It is clear, however, that section 151 gives no powers whatever. It merely saves such inherent

1926

HARNAND
LAL
C
CHATURBHUI.

(1) (1921) I.L.R., 43 All., 564.

1926
HARNAND
LAL
v.
CHATURBHUI.

power, as the court may already have, from being limited or otherwise affected by the Code. When, therefore, a court interferes in response to a prayer such as that now in its present form before us, it exercises the inherent power already possessed by it and does not in any sense exercise a power conferred by section 151. This is no mere verbal distinction, for it means that section 151 gives no power whatever to the court to pass an order which it may deem to be necessary for the ends of justice or to prevent abuse of the process of the court. Any power that this Court may have must be sought for elsewhere than in section 151.

It has been urged by the opposite party that "the power given by section 151 of correcting an order is limited to a court correcting its own orders." Section 151 confers no powers whatever. Even if it did so, it would be impossible to accept the argument that a subordinate court could exercise inherent powers in reference to an order of its own, but that a superior court could not, in the event of the subordinate court refusing to do so, give the necessary redress. In the majority of cases in which it has been held that there was inherent power in the court to redress an injustice, the injury has been done by an order of a subordinate court and the inherent power to redress it exercised by a superior court. The duty of a subordinate court and the duty of a superior court to do justice is one and indivisible and the courts cannot be divorced from each other: *Alexander Rodger v. The Comptoir D'Escompte De Paris* (1). See also *Debi Bakhsh Singh v. Habib Shah* (2), where the Privy Council referred to an order of the lower appellate court in India as an abuse of process committed by that court and gave

(1) (1871) L.R., 3 P.C., 465.

(2) (1913) I.L.R., 25 All., 331

redress in the exercise of inherent powers. On this point it is unnecessary to quote further authority.

As to the extent of the inherent power existing in "the court," section 151 only indicates that there is a power "to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the court." The principles controlling the exercise of this inherent power have been the subject of many judicial decisions. Contention, such as there has been, has chiefly revolved round the question how far there is inherent power in the court to override an express statutory declaration in circumstances indicating the desirability of such a course in the interests of justice. With that question we are not concerned in this case. An order staying the proceedings in the court of the Subordinate Judge cannot be said to be in conflict with any statutory provision. We are merely asked to control, in the interests of justice and in order to prevent an abuse of the process of the court, the procedure of the subordinate court in circumstances for which the legislature has made no provision. In this we may agree with the remark of STUART, J., in *Joshi Shib Prakash v. Jhinguria* (1), that "the enactment of this section (section 151) declared the existence of an inherent jurisdiction in all courts to go beyond the law of procedure in the ends of justice," without its being necessary for us to express concurrence in or dissent from the further observations of the learned Judge in that case. In *Balgobind v. Sheo Kumar* (2), WALSH and RYVES, JJ., held at page 876 that "an abuse of the process of the court" includes "the idle multiplicity of proceedings," and of this we think there can be no doubt. We, therefore, hold that we have power to interfere in the exercise of

1926

HARNANE

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C.

CHATURBHUI

(1) (1923) I.L.R., 46 All., 144.

(2) (1924) I.L.R., 46 All., 864.

1926
HARNANI
LAL
v.
CHATURBHUI.

this Court's inherent powers, and we think, further, that the circumstances of the case indicate beyond any doubt that it is a suitable case for the exercise of those inherent powers. It is clear that they are powers that must be sparingly exercised; but in a suitable case it is the duty of the court to exercise them. We therefore accede to the application made to us and direct that the proceedings in the court of the Subordinate Judge under order XXXII, rule 15, of the Code of Civil Procedure be stayed until such time as the proceedings in lunacy in the court of the District Judge of Mainpuri have been determined.

Application allowed.

APPELLATE CIVIL.

1926
January,
25.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

DAULAT SINGH (JUDGEMENT-DEBTOR) v. MAHARAJ
RAJA RAMJI (DECREE-HOLDER).*

Civil Procedure Code, section 47(2)—Decree passed against a minor not properly represented in the suit—Objection taken in execution proceedings to validity of decree—Procedure.

A defendant who at the date of the filing of a suit against him was in fact a minor was treated throughout the suit as of full age and a decree was passed against him. When the decree came to be executed, he took objection that he was throughout the suit and at the date of the decree a minor, and therefore the decree against him was a nullity.

Held (1) that the defendant judgement debtor might have filed a separate suit for a declaration that the decree was not binding on him, and (2) that the court below both could

* Second Appeal No. 1642 of 1924, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 31st of May, 1924, reversing a decree of Gauri Shankar Tewari, Subordinate Judge of Mirzapur, dated the 14th of May, 1923.

and should have treated his objection in the execution department (subject to the payment of the necessary court fees) as a suit.

Rashid-un-nisa v. Muhammad Ismail Khan (1), *Man-har Lal v. Jadunath Singh* (2), *Partab Singh v. Bhabuti Singh* (3), *Pasupathy Ayyar v. Kothanda Rama Ayyar* (4), and *Jotindra Mohan Tagore v. Muhomed Basir Chowdhry* (5), referred to.

THE facts of this case were as follows:—

A decree was passed against the defendant appellant on the 18th of March, 1920. In the suit he was treated as of full age. He did not appear, so that the decree was passed *ex parte*. When the decree was put into execution the judgement-debtor filed an objection, urging that the decree was a nullity and was not binding upon him, inasmuch as he was in fact a minor at the time when it was passed.

The court of first instance (Subordinate Judge of Mirzapur) went into the question of the alleged minority and came to the conclusion that the defendant was in fact a minor. Purporting to act on the execution side, it disallowed the application for execution and referred to the provisions of order XXXII. rule 5, clause (2), of the Code of Civil Procedure. No express order discharging the previous decree was, however, passed by it. The decree-holder appealed to the District Judge, who allowed the appeal and ordered execution to proceed. The District Judge was of opinion that the executing court was not entitled to go behind the decree, which, on the face of it, had been passed against an adult person. On the question of fact he agreed with the court below that the judgement-debtor was a minor

1926

DAULAT
SINGHT.
MAHARAJA
RAMJI

(1) (1907) I.L.R., 31 All., 572. (2) (1903) I.L.R., 28 All., 585.

(3) (1913) I.L.R., 35 All., 487. (4) (1904) I.L.R., 28 Mad., 64.

(5) (1904) I.L.R., 32 Calc., 332.

1926

DAULAT
SINGH
v.
MAHARAJ
RAJA
RAMJI.

when the decree was passed. The judgement-debtor appealed to the High Court.

Munshi *Sheo Dihal Sinha*, for the appellant.

Munshi *Haribans Sahai*, for the respondent.

The judgement of SULAIMAN, J., after stating the facts as above, thus continued :—

In appeal before us it is contended that the order of the first court should have been upheld and the decree held not to be binding on the appellant. There can be no doubt that the decree is not binding on the appellant. On the findings of the courts below he was a minor on the date when the decree was passed and not having been properly represented by a guardian *ad litem* in the suit he was not properly made a party to the decree and cannot in any way be bound by it. This position is not seriously disputed by the learned vakil for the respondent. What, however, he contends is that it is not open to the execution court to go into this question and decide the point against his client. He relies strongly on the judgement of the Calcutta High Court in *Kalipada Sarkar v. Hari Mohan Dalal* (1), where it was remarked that a proceeding to enforce a judgement is collateral to the judgement and therefore no inquiry into its validity or regularity can be permitted in such a proceeding, and the opinion was expressed that the safest course was to adhere rigidly to the established principle that every judgement and order is good until discharged or declared inoperative, and that the execution court cannot inquire into the validity or propriety of the decree. It is not clear, however, whether the learned Judges were called upon to consider the advisability of treating the proceeding in execution as a proceeding in suit.

(1) (1916) I.L.R., 44 Calc., 627.

The court of first instance purported to act under order XXXII, rule 5, but it is unnecessary for us to express a definite opinion whether that rule applies to a case where a decree has already been passed.

1926

DAULAT
SINGH
v.
MAHARAJ
RAJA
RAMJI

There is no doubt whatsoever that a separate suit for a declaration that such a decree is not binding on the minor is maintainable and in several cases their Lordships of the Privy Council have entertained such suits. We may refer to *Rashid-un-nisa v. Muhammad Ismail Khan* (1), *Manohar Lal v. Jadunath Singh* (2), and *Parab Singh v. Bhabuti Singh* (3). The only question therefore is whether such a declaration can be given in these proceedings. Even under the old Code of Civil Procedure, it was held that it was open to an execution court to treat an application for execution as a plaint. Under section 47(2) of the new Code it is expressly provided that a court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees. If, therefore, a declaration can be granted in a separate suit, there is nothing to prevent an execution court from treating a proceeding under section 47 as a proceeding in a suit and granting the same declaration subject to payment of any additional court fees. That this power can be exercised even by an appellate court is well settled, and we may refer to *Pasupathy Ayyar v. Kothanda Rama Ayyar* (4), and *Jotindra Mohan Tagore v. Mahommed Basir Chowdhry* (5). If a separate suit had been instituted the only point in

Sulaiman, J.

(1) (1909) I.L.R., 31 All., 572. (2) (1906) I.L.R., 28 All., 585.

(3) (1913) I.L.R., 35 All., 487. (4) (1904) I.L.R., 28 Mad., 64.

(5) (1904) I.L.R., 32 Calc., 332

1926

DAULAT
SINGH
v.
MAHARAJA
RAJA
RAMJI.

the suit would have been whether the defendant appellant was in fact a minor on the date when the previous decree was passed. This fact has been tried by the courts below and both parties have had an opportunity to adduce evidence on the point and there is a concurrent finding of fact against the respondent. Under these circumstances it is wholly unnecessary that the case should be sent back to the court of first instance in order that there should be a trial *de novo*. It is open to an appellate court to treat the proceeding arising out of an application under section 47 as if it were a proceeding in a suit and grant the necessary relief.

I would, therefore, allow the appeal and setting aside the decree of the courts below treat the proceeding as a proceeding in a suit and, subject to payment of the necessary court fees, grant the appellant Daulat Singh a declaration that the decree dated the 18th of March, 1920 is not binding on him inasmuch as he was a minor on the date when it was passed and was not properly represented. It will be open to the decree-holder, if so advised, to apply to the court which passed the decree to revive the decree by issuing fresh summons to the defendant.

MUKERJI, J.—I agree and wish to add only a few words. In the case of *Imdad Ali v. Jagan Lal* (1), this Court held that where a decree had been passed against a dead person, his legal representative could, in the execution department, challenge the validity of the decree on the aforesaid ground. It is not necessary to consider whether that principle was right or wrong and whether that principle applied to the facts of this case. It is abundantly clear on authorities that a suit is maintainable by the appellant, in the circumstances of this case, to

(1) (1895) I.L.R., 17 All., 478.

obtain a declaration that the decree that was passed against him during his minority without the appointment of a guardian was not at all binding on him. The appellant sought to obtain a declaration to that effect by his objection put forward in the execution department. By the very salutary provisions of section 47 (2) of the Civil Procedure Code his objection could be treated as a suit, and the court entertaining the objection being the same court as passed the decree, and there being no question of limitation, the objection could be disposed of as a suit and the necessary declaration could be granted. In answer to the appellant's objection the decree-holder filed his reply and the question of fact was tried, *viz.*, whether the appellant was a minor at the date of the decree. It is common ground that no guardian was appointed for the appellant. The finding is concurrent by both the courts below that the appellant was a minor at the date of the decree. The appellant is entitled to a declaration that the decree passed against him is not binding. The appellant will have, of course, to make good the court fees payable by him in the case of a suit and the appeal from a decree in such a suit and there is nothing else to debar him from the fruits of these proceedings.

BY THE COURT.—We allow the appeal and setting aside the decree of the court below, treat the proceeding as a proceeding in a suit and, subject to the payment of Rs. 20 by the appellant within two weeks from this date as court fees and Rs. 10 by the respondent within three weeks and in default thereof by the appellant within another fortnight, we grant the defendant Daulat Singh a declaration that the decree dated the 18th of March, 1920, is not binding on him and the parties are restored to their original positions as they were in before that decree was

1926

DAULAT
SINGH
v.
MAHARAJA
RAJA
RAMJI.

1926

DAULAT
SINGH
v.
MAHARAJ
RAJA
RAMJI.

passed. As the proceedings were not conducted in the proper form, we direct that the parties should bear their own costs of these proceedings throughout.

Appeal allowed.

REVISIONAL CRIMINAL.

1926
January
26.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

EMPEROR v. KAMLA PAT AND OTHERS.*

Act no. XLV of 1860 (*Indian Penal Code*), section 379—*Insolvency—Removal of property from custody of official receiver by persons alleging themselves to be owners—* Act No. V of 1920 (*Provincial Insolvency Act*), sections 56 and 68—*Theft.*

Where property has been taken possession of by a receiver in insolvency in the *bond fide* belief that it is property belonging to the insolvent, any person who takes such property from the possession of the receiver is guilty of theft, even though he may claim to be the owner thereof. *Chunnu v. King-Emperor* (1) and *Grey v. Woogramohan Thakur* (2), referred to.

THE facts of this case were as follows :

One Malkhan Singh was adjudicated an insolvent and the official receiver took charge of his property. The receiver on the 30th of March, 1925, attached certain agricultural produce, believing it to be the property of the insolvent, and put it in charge of one Badlu. From the possession of Badlu the property was removed by Kamla Pat and others on the 3rd of April, 1925. In respect of this removal Kamla Pat and others were charged with and convicted of theft. They appealed to the Session Judge by whom the convictions and sentences were confirmed.

* Criminal Revision No. 500 of 1925, from an order of E. L. Norton, Sessions Judge of Jhansi, dated the 25th of July, 1925.

(1) (1911) 8 A.L.J., 656.

(2) (1901) I.L.R., 28 Cal., 790.

They then applied in revision to the High Court.

Dr. N. C. Vaish, for the applicants.

The Assistant Government Advocate (Dr. M. Wali-ullah) for the Crown.

The judgement of MUKERJI, J., after reciting the facts, thus continued:—

Two points have been raised in this Court. The first is that the act of the applicants was done honestly, although they had a knowledge of the fact that the property had been attached by the receiver.

* * * * *

The first question is the one which has to be decided and there seems to be no clear authority on the point. In the case of *Chunnu v. King-Emperor* (1), it was held that where a certain movable property had been attached in execution of a decree as belonging to a judgement-debtor and the judgement-debtor himself took possession of the property, he was guilty of the offence of theft. The whole question is whether the receiver was in possession of the property and if the applicants removed that property from the possession of the receiver, even under an assertion of *bonâ fide* claim of title, they ought to be held liable under section 379 of the Indian Penal Code. The gist of the offence is that a person shall not remove from any person's possession without his consent any movable property. The remedy in such a case of the true owner would be to move the court under section 68 of the Provincial Insolvency Act and not to take the law in his own hand.

Under section 20 of the Insolvency Act the court may appoint a receiver before an adjudication. The receiver acquires all the powers which were conferable on the receiver appointed under the Code of Civil Procedure of 1908.

(1) (1911) 8 A.L.J., 656.

1926

EMPEROR

v.

KAMLA

PAT.

1926

EMPEROR
v.
KAMLA
PAT.

Under section 28 of the Insolvency Act the property, on adjudication, vests in court or in the receiver. It follows that on an adjudication the property of the insolvent vests in the court and if there is no receiver, in nobody else.

Mukerji, J.

Under section 56 of the Provincial Insolvency Act where a receiver is appointed the property vests in such receiver.

Under section 57 the Local Government may appoint such persons as it thinks fit as official receivers. The present case is that of an official receiver.

Under section 58 of the Act where there is no receiver, the court has all the rights as to exercise all the powers conferred on a receiver. It will be noticed therefore that the receiver comes in only to aid the court in the performance of its duties.

Under section 59 of the Insolvency Act it is the receiver's duty to realize the property of the debtor with all convenient speed. To realize the property of the debtor the receiver has actually to seize that property and to reduce it into his possession. In this particular case the receiver, believing that the property in question was the property of the insolvent, reduced it into his possession by sending his man to seize the property and by appointing a guard. On the facts, therefore, there can be no doubt that the receiver was in possession of the property when the same was removed by the applicants.

It has been urged that the court has no jurisdiction to dispossess any person who is not the insolvent or who does not claim under him, from the possession of any property. This may be at once conceded. But the question is not of title but of possession.

When a court takes possession of another man's property, under the *bonâ fide* belief that it is the property of the insolvent, it is entitled to keep possession till the title of the claimant is established. Similarly the receiver, acting under a *bonâ fide* belief that it is the property of the insolvent which he is seizing, is entitled to be maintained in possession till the title of the claimant is established. The law provides an easy remedy against the action of the receiver by the provisions of section 68 of the Provincial Insolvency Act. That was the remedy of the applicants, and not to seize the property which had been reduced into possession by the receiver.

If we look to the broad principles of administration we shall see that the view taken in this case by me is in accordance with public policy. If the receiver be treated as having no better position than that of the insolvent himself, that is to say, the position of a private person, it would be impossible for him to administer the estate of an insolvent. Any property that he seizes may be taken away from him, and instead of the party taking away the property from the possession of the receiver, coming to court for his remedy, the receiver will be obliged to go to court for his remedy. It would be impossible for him to administer the estate of the insolvent. Section 68 of the Insolvency Act will become a dead letter.

I hold that the applicants acted contrary to law in removing the property from the possession of the receiver and were consequently rightly held to be guilty of the offence under section 379 of the Indian Penal Code. I would, therefore, dismiss the application in revision.

1926

EMPEROR
v.
KAMLA
PAT.

Mukerji J.

1926

EMPEROR
v.
KAMLA
PAT.

SULAIMAN, J.—I concur in the conclusion, though with some difficulty. The case of *Chunnu v. King-Emperor* (1), related to a case where property had been attached in execution of a decree. In my opinion there is a slight difference between the case of an attachment in execution of a decree and a seizure by a receiver in an insolvency matter. In the case of an attachment the decree-holder moves the court in the first instance and furnishes an inventory duly verified describing the property sought to be attached in detail. The attachment is effected through an officer of the court at the risk of the decree-holder and if it subsequently turns out that an innocent third person has suffered loss in consequence of that attachment the party who moves the court is civilly liable therefor. Furthermore, in cases of movable properties under order XXI, rules 43 and 44, it is specifically provided that they are to be attached by actual seizure or by a proclamation, both of which have the legal effect of passing the possession of the property into the custody of the court. Therefore when a property has been attached under an order of a civil court in execution of a decree, possession has legally passed to the court. Any person who takes possession of that property subsequent to that attachment would obviously be guilty under section 379 of the Indian Penal Code, if he knew that the property had been attached and was therefore necessarily acting dishonestly. In the case of a receiver under the Insolvency Act there can be no question of attachment whatsoever. By operation of section 28 the property vests in the receiver himself. It is, therefore, not necessary for him to attach any property in the sense in which a decree-holder who has no interest in the property of the

(1) (1911) 8 A.L.J., 656.

judgement-debtor before attachment proceeds to do so. The position of the receiver is for the time being that of a true owner and he is certainly entitled to obtain possession. Section 59 authorizes him to realize with convenient speed the property of the debtor, which may in ordinary cases include a power to obtain possession of the property peacefully. Section 56 contains a proviso that nothing in the Act shall be deemed to authorize the court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove. There is no express provision in the Act laying down that a receiver has power to seize the property of another person other than the insolvent, provided he acts *bonâ fide* in the belief that the property is part of the assets of the insolvent. Under these circumstances it may be urged that the initial seizure of the property of a third party by the receiver was not lawful or justified. In a case where a receiver had been appointed by the High Court in appeal and he was dispossessed, the Calcutta High Court thought that the person offending would be guilty of contempt of court, vide *Grey v. Woog-ranokun Thakur* (1). In a number of cases where the party acts fraudulently it may be possible to bring the case within the purview of section 206 of the Indian Penal Code or, where there is an obstruction, under section 183 of the Indian Penal Code. But I would have imagined that if the receiver had no lawful authority to dispossess a true owner from his property, if he professed to do so and the true owner did not recognize his dispossession and retained possession, it would be difficult to hold that the true owner was guilty of theft.

1926

EMPEROR
C.
KAMLA
PAT.

Sulaiman, J

(1) (1901) I.L.R., 28 Calc., 79.

1926

EMPEROR
v.
KAMLA
PAT.

I realize, however, that the general policy of the law would be defeated if it were to be held that any person can defy a receiver in insolvency and refuse to recognize a seizure made by him. Under section 68 the person aggrieved has power to apply to the court requesting it to revise or modify the act or decision of the receiver. Furthermore, the offence as defined in section 378 of the Indian Penal Code is really an offence against possession and not so much against title. The result is that under certain circumstances it is possible to convict the owner himself of having stolen his property where he has removed it dishonestly from the custody of another person lawfully in possession for the time being. It, therefore, seems immaterial to consider how the possession of the receiver arose originally, provided it can be held that at the moment when the accused dispossessed him, the receiver was lawfully in possession of it, actual or constructive. In the present case it has been found by the courts below that the accused were aware of the fact that the crops which they removed had really been seized by the receiver's agent. On the day when they removed the crops the receiver was in lawful possession of it, though his initial taking possession might not have been quite justified. Under these circumstances I agree with my learned brother that an offence under section 379 of the Indian Penal Code was committed. When the accused were aware of the fact of the previous seizure by the receiver it cannot be urged that they were not acting dishonestly merely because they were putting forward a *bonâ fide* claim of title.

BY THE COURT.—The application is dismissed.

Application dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Walsh and Mr. Justice Dalal.

1926
February, 2.

EMPEROR v. SHEORAJ SINGH.*

Criminal Procedure Code, section 512—Evidence—Absconding offender—Use of evidence taken for other purposes as if it were evidence specially recorded under the terms of section 512.

Evidence given at a trial for another purpose cannot be, by an *ex post facto* operation, converted into an equivalent of what is called a deposition taken under section 512. when at the time of taking the evidence the question of recording a deposition under that section was not under contemplation. *Emperor v. Bhagwati* (1), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Mr. F. Owen O'Neill, for the appellant.

The Assistant Government Advocate (Dr. M. Wali-ullah), for the Crown.

WALSH and DALAL, JJ.:—In this appeal the first question which we have to decide is the admissibility of the evidence of two witnesses who are absent. The learned Judge in the court below has treated the evidence as though given under section 512 and his mind has been diverted from the real difficulty by reason of the fact that the defence objected under section 512 that it was not shown that the accused was absconding at the time when the statement of the witness were taken. and the Judge decided against that objection on the ground that although the declaration that the accused was absconding was subsequent, the fact that he

* Criminal Appeal No. 955 of 1925, from an order of H. Beatty, Sessions Judge of Moradabad, dated the 9th of November, 1925.

(1) (1918) I.L.R., 41 All., 60.

1926

EMPEROR
v.
SHEORAJ
SINGH.

absconded was prior to the taking of the evidence. We do not disagree with him. But the real point is this. The statements of these witnesses were not recorded under section 512 at all. They were called in the ordinary course of the case before the committing Magistrate and before the Sessions, as part of the case against four men who were then under trial. They mentioned the present appellant who is said to have been absconding at the time, but the attention of the court was not directed to the case against that absconding person, nor was the evidence given in any sense as evidence against that absconding person.

The question of law, therefore, is this. When two witnesses who have given evidence at a previous trial against persons then on their trial happen to have referred in the course of their evidence at the trial to a person who is absconding and is subsequently tried, can their statements be read at the subsequent trial of the accused who was then absconding, merely because they happen to be absent and cannot give evidence? In other words, can evidence given at a trial for another purpose be converted, by an *ex post facto* operation, into an equivalent of what is called a deposition taken under section 512, when at the time they gave their evidence the question of recording a deposition under section 512 was not contemplated?

We think not. The provisions of the statute forbid it. The objection to the evidence is the fundamental objection, that statements made against a person in his absence cannot be used as evidence against him in a criminal trial. Exceptions to that rule can only be created by statute, and when a statute permits something to be done which a fundamental rule prohibits, it can only be done by compliance with

the statute which creates the exception. On grounds of ordinary justice there would be great objection to the practice. As my brother has pointed out, the mind of the court, and of the counsel for the prosecution, at the time when such witnesses would be giving their evidence in the box would not be directed to the question of the guilt or otherwise of the absconding person, and many things which ought to be asked might be omitted, and *a fortiori* questions in cross-examination asked by the four persons who are on their trial, with the express purpose of throwing guilt upon the absent party, might extract from such witnesses statements prejudicial to the absent party which could not be permitted if the witnesses were being properly examined under section 512.

We, therefore, hold as a question of law that the evidence of these two witnesses ought to have been excluded from the trial.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Dalal and Mr. Justice Boys.

NAND LAL SARAN (OBJECTOR) v. DHARAM KIRTI SARAN (DECREE-HOLDER).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182—Execution of decree—Limitation—Civil Procedure Code, section 48(a)—Execution only for incidental costs—Step in aid of execution.

Where a decree is passed jointly against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of explanation (1) to article 182 of the first schedule to the Indian Limitation Act, 1908, will apply to the decrees passed severally and the second portion to the decree or decrees passed jointly. *Subramanya Chettiar v. Alagappa Chettiar* (1), dissented from.

* First Appeal No. 176 of 1925, from a decree of Gaur Nath, First Subordinate Judge of Moradabad, dated the 24th of March, 1925.
(1) (1906) I.L.R. 30 Mad., 265.

1925

EMPEROR

SHEKHAR
SINGH1925
December,
14.

1925

NAND
LAL
SARAN
v.
DHARAM
KIRTI
SARAN.

An application for execution of costs incidental to the execution proceedings is not an application for the execution of the original decree or any part of it. *Appu Rao v. Ramakrishna Chettiar* (1), referred to.

THE facts of this case were as follows :—

A decree based on an award made in the course of a suit for the partition of a family business was passed on the 18th of May, 1909. An appeal against this decree was preferred by one of the parties, but was dismissed upon the ground that, the award being legally valid and the decree being in accordance therewith, no appeal lay. Amongst other matters with which the award and the decree based thereon dealt was the partition of a hundi business in Rampur. As to this the arbitrator seemed to think that he could not give a decision which would bind the parties, but nevertheless declared that a sum of Rs. 12,000 odd was due by the Rampur business to two of the parties, viz., Dharam Kirti Saran and Sibta Prasad. Dharam Kirti Saran applied in execution to recover his share of this amount. Objections were raised by the party against whom execution was sought—Nand Lal Saran, but the objections were dismissed on the 11th of October, 1915, upon the ground that the managers of the Rampur business were bound to pay the amount claimed.

The present appeal arose out of an application to execute the decree filed on the 17th of November, 1924. In the lower court the judgement-debtor, Nand Lal Saran, objected to the execution of the decree on the following grounds :—

1. That twelve years had expired since the date of the decree sought to be executed, so the application was barred under the provisions of section 48(a) of the Code of Civil Procedure.

(1) (1901) I. L. R., 24 Mad., 672.

2. That if for any reason there was no such bar, then the application was barred by the period of three years fixed under article 182(2) of the Limitation Act, because no step in aid of execution of this particular decree had been taken within three years of the 17th of November, 1924.

3. That the decree was not capable of execution on the ground that there was no operative order in the decree for the recovery of the sum claimed by the decree-holder.

The lower court held that there was no bar under section 48 because the period of limitation would be calculated not from the date of the decree but from the date of the dismissal of an appeal from that decree on the 18th of November, 1912; that there had been a step taken by the decree-holder against another judgement-debtor for recovery of certain costs by an application in execution which saved limitation as against the present judgement-debtor objector and that though there was no operative order in the decree of the 18th of May, 1909, for the payment of the sum claimed by the decree-holder from the judgement-debtor, this defence was barred to the present judgement-debtor by the rules of *res judicata*. It accordingly allowed the application for execution. Against this order Nand Lal Saran appealed to the High Court.

Dr. Kailas Nath Katju (with him Sir Tej Bahadur Sapru, Dr. Surendra Nath Sen and Munshi Narain Prasad Asthana), for the appellant.

Munshi Durga Prasad (with him Maulvi Iqbal Ahmad), for the respondent.

The judgement of the High Court (DALAL and Boys, JJ.), after stating the necessary facts and discussing the question whether execution of the decree was barred by reason of section 48 of the Code of Civil Procedure, found that limitation was to be counted

1925

NAND
LAL
SARAN
v.
DHARAM
KIRTI
SARAN.

1925

NAND
LAL
SARAN
v.
DHARAM
KIRTI
SARAN.

from the date of the original decree, i.e., the 18th of May, 1909, and therefore execution would be barred.

On the point of the bar by the three years' rule of limitation the judgement was as follows :—

The execution case, which according to the decree-holder respondent saves limitation, is case No. 233 of 1921, in which the application was filed on the 3rd of March, 1922. The present application is filed within three years of the date of that application, which was filed by Dharam Kirti Saran for withdrawal of money deposited by Sahu Param Kirti Saran in court. The amount sought to be recovered and which was deposited consisted of costs, which were awarded to Dharam Kirti Saran against this particular judgement-debtor Param Kirti Saran during execution proceedings in the trial court and in the High Court. Dharam Kirti Saran had applied for execution of a portion of the decree of 1909, in which he was decreed a sum of Rs. 51,000 odd against the deceased father of Param Kirti Saran. Param Kirti Saran objected and his objection was dismissed. The execution court ordered on the 8th of March, 1916, (execution case No. 308 of 1914 and miscellaneous case No. 127 of 1916), that Param Kirti Saran judgement-debtor shall pay Rs. 418-8-0 to the decree-holder Dharam Kirti Saran on account of the costs incurred in the application of objection. Param Kirti Saran appealed from this order. His appeal was dismissed, and he was made liable to pay costs Rs. 262. These were the two items of costs of which recovery was desired by an application of the 30th of August, 1921, in the execution department. The question is whether this step in execution of a decree against one of several judgement-debtors saved limitation as against the present judgement-debtor who was not a party to the previous execution proceeding. If it does not, the application

of the 3rd of March, 1922, for withdrawal of this money from court will not save limitation. Explanation 1 to article 182 of the first schedule of the Limitation Act lays down (second paragraph) :—" Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them or against his or their representatives, shall take effect against them all."

It was argued on behalf of the appellant that the first portion of this rule will apply to the present case. The alleged facts, on which this argument was based, are not correct in our opinion. The appellant's case was that there was no portion of the decree passed against all the defendants jointly in favour of Dharam Kirti Saran, that the decree was passed severally and Nand Lal Saran was not interested in the portion of the decree passed in favour of Dharam Kirti Saran against Sibta Prasad. We find in the award, clause (19), that certain properties were allotted to Dharam Kirti Saran as against all the defendants of this suit. The decree passed on this award decreed this property, which was joint up to the institution of the suit, in favour of Dharam Kirti Saran against all the defendants. It is not the fact, therefore, that no portion of the decree was passed jointly against all the defendants. The case before us does not appear to be specifically provided for in the explanation, where a portion of the decree is jointly passed against all the defendants and there are other portions of the decree passed severally against different defendants. The question

1925

NAND
LAL
SARAN
v.
DHARAM
KIRTI
SARAN.

1925

NAND
LAL
SARAN
v.
DHARAM
KIRTI
SARAN.

will be whether such a decree will fall within the first portion of the explanation or the second or whether such a decree will be governed by the first part of the explanation as regards the several decrees and by the second portion of the explanation as regards the joint decrees. The opinion of the Madras High Court is that where any portion of the decree is joint, the case will fall within the second part of the explanation. This was laid down by a Bench of the Madras High Court in *Subramanya Chettiar v. Alagappa Chettiar* (1). According to the learned Judges the second part of the paragraph should be read literally, i.e., the words "where the decree or order has been passed jointly against more persons than one." The reasoning does not appear to us to be convincing. If the first portion is read literally—"where the decree or order has been passed severally"—it may be argued with equal reason that such a case must be governed by the first part of the explanation. The principle appears to us to be that when *A*, *B* and *C* are jointly liable and the decree-holder is attempting to recover the decretal amount from one of them, he should not be barred from recovering it from the rest if he fails to recover it from that particular judgement-debtor. He exercises due diligence in recovering the amount decreed to him and it will be no fault of his if he does not find the particular judgement-debtor of sufficient substance to pay up the entire decree. In such a case it will be equitable to direct that steps taken in aid of execution against one of the joint judgement-debtors should save limitation as against the others. It is also obvious that when a joint decree is passed the decree-holder cannot execute it at one and the same time against them all separately for the same amount. The

(1) (1906) I.L.R., 30 Mad., 268.

case is different when certain portions of a decree are jointly passed and others severally passed against more persons than one. While the decree-holder is executing the joint portion of the decree against one of the joint judgement-debtors, there is nothing to prevent him from executing the other portions of the decree against the several judgement-debtors who are liable thereunder. It would be expected of a diligent decree-holder that he should do so. We think, therefore that, where a decree is jointly passed against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of the explanation should apply to decrees passed severally and the second portion to the decree or decrees passed jointly. We find ourselves unable to agree with the opinion of the Madras High Court. We have not been referred to any rulings on the subject of any other High Court during the arguments. We hold that the application is barred by the three years' limitation.

From another point of view also the application will be so barred. The three years' period is to be counted, in terms of article 182, clause (5), from the date of applying in accordance with law to the proper court for execution or to take some step in aid of execution of the decree. The step in aid of execution which would save limitation is the step taken in execution of that particular decree which is sought to be executed subsequently. In the present case the step taken was to withdraw costs of execution proceedings and those costs were not costs in the suit. Those costs were not of the suit because they were not incurred in execution proceedings but were incurred by a particular objector who objected to a certain execution proceeding. That decree for costs was a separate decree

1925

NAND
LAL
SARAN
v.
DHARAM
KIRTI
SARAN.

1925

NAND
LAL
SARAN
v.
DHARAM
KIRTI
SARAN.

against a particular objector. The execution application for recovery of such costs was not an execution application of the original decree. The learned Subordinate Judge has explained away this difficulty by holding that the application in execution by Dharam Kirti Saran for recovery of Rs. 51,000 and odd and the objection of Sahu Param Kirti Saran to the payment of that amount were proceedings in suit between the preliminary decree and the final decree. According to the lower court the order for payment, dated the 8th of March, 1916, was really a final decree for the payment of Rs. 51,000 and odd and the costs incurred in obtaining that decree were costs in the suit. If this view be accepted, the decree of 1908 will be taken to be a preliminary decree and there would be several final decrees on foot thereof. The present judgement-debtor was not a party to the final decree of the 8th of March, 1916, so any steps taken in execution of that decree cannot save limitation against the present judgement-debtor. Our view, that an application for execution of costs incidental to the execution proceedings was not an application for the execution of the original decree or any part of it, is supported by a Bench ruling of the Madras High Court in *Appu Rao v. Rama Krishna Chettiar* (1).

In the result we decree the appeal and dismiss the execution application of Dharam Kirti Saran with costs.

Appeal allowed.

(1) (1901) I.L.R., 24 Mad., 672.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

1926
February,
1.

BALLABH DAS (DECREE-HOLDER) v. MURAT NARAIN
SINGH AND OTHERS (JUDGEMENT-DEBTORS).*

*Act (Local) No. II of 1901 (Agra Tenancy Act), section 20—
“Thekadar”—Perpetual lease of a village, not for agricultural purposes—Power of lessee to mortgage—Act
No. IV of 1882 (Transfer of Property Act), section 108
—Lease.*

An entire village was leased in perpetuity for the consideration of a premium and a yearly rent. There was nothing to indicate that the lessee was expected to cultivate any of the land in the village himself, nor any covenant restraining the transfer of his interest.

Held on a construction of the document that section 20 of the Agra Tenancy Act, 1901, did not apply and that it was competent to the lessee to make a valid mortgage of his rights under the lease.

Held also by SULAIMAN, J., that the failure of a mortgagor to raise the plea of non-transferability in a suit on the mortgage would not prevent him raising it subsequently as a plea in bar of sale in execution of a decree passed against him. *Mubarak Husain v. Ahmad* (1), followed.

THE facts of this case were as follows.—

On the 18th of February, 1875, one Sita Ram granted a permanent lease of an entire village in favour of one Kalka Prasad Singh. The heirs of Kalka Prasad Singh, in the years 1915 and 1916, made two mortgages of the whole of this village in favour of Seth Ballabh Das. The mortgagee brought a suit for sale on the basis of his mortgage deeds. No written statement was put in, and the mortgagors did not

* Second Appeal No. 1800 of 1924, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 28th of May, 1924, confirming a decree of Gauri Shanker Tewari, Subordinate Judge of Mirzapur, dated the 20th of April, 1923.

(1) (1924) I.L.R., 46 All., 489.

1926

BALLABH
DAS
v.
MURAT
NARAIN
SINGH.

contest the claim on the ground that the property mortgaged was not transferable. An *ex parte* decree was passed. When this decree was put into execution, the judgement-debtors raised an objection that their interest in the property was not transferable inasmuch as they were thekadars within the meaning assigned to that term in the Agra Tenancy Act, 1901. Both the courts below accepted this contention and accordingly the application for execution was disallowed. The decree-holder appealed to the High Court.

Babu *Piari Lal Banerji* and Munshi *Sheo Dihal Sinha*, for the appellant.

Munshi *Gadadhar Prasad*, for the respondents.

The judgement of SULAIMAN, J., after stating the facts as above, thus continued :—

First of all it is contended that section 20(3) which makes the interest of a thekadar, subject to the terms of the lease, not transferable does not apply to execution sales. The argument is that wherever the legislature intends that the word “transferable” should cover execution sales also, it expressly has said so. Our attention is drawn to sub-clause (2) where it is expressly provided that the interest of other tenants is not transferable in execution of a decree of a civil or revenue court or otherwise. This contention cannot be accepted. The word “transferable” is used at two places in the same section 20. In sub-clause (2) it is used in its general sense, no matter whether the transfer is voluntary or involuntary. Although the whole clause is not repeated in sub-clause (3), there is no reason to suppose that the word “transferable” is not used in the same sense in that clause also and that it is confined to private transfers only. In my opinion this contention therefore must be rejected.

The next argument advanced before us is that the lease in question was executed in the year 1875, long before the present Agra Tenancy Act was passed, and that inasmuch as at that time there was no prohibition against transfers of an interest by a thekadar, the interest remained transferable. This argument also has no force. Assuming that the interest was transferable prior to 1901, it can be made non-transferable by an express enactment. The law governing the transfer must be that which was in force on the dates when the transfers in dispute took place.

1926

BALLABH
DAS
v.
MURAT
NARAIN
SINGH.

Sulaiman, J.

Thirdly, it is contended that it was the duty of the mortgagors to raise the plea of non-transferability now disputed before us and their failure to raise it prevents them from raising this point in the execution department. The contention is that the plea is barred by the principle of *res judicata*. There would appear to be some force in this contention, especially in cases where the nature of the tenancy is not quite clear and where it may be disputed whether the right is or is not transferable. But in view of the pronouncement of the Full Bench in the case of *Mubarak Husain v. Ahmad* (1), where stress was laid on the want of jurisdiction in the court itself for selling properties which were declared by law to be non-transferable, I feel precluded from allowing this point to be raised.

Before I come to the main point which really arises in this case, I must note an objection that has been raised on behalf of the respondent. The contention is that the language of sub-clause (3) in section 20 makes the interest of a thekadar always non-transferable and that it is only heritable when the terms of the lease expressly provide for it. If the language of sub-clause (3) were to be interpreted strictly and literally, there may at first sight appear to be some force in this

(1) (1924) I.L.R., 46 All., 489.

1926

BALLABH
DAS
v.
MURAT
NARAIN
SINGH.

contention. It must be admitted that the language is not happy. But if we were permitted to examine the report of the Select Committee, it would appear that the intention was not to alter the law so far as a thekadar was concerned. In the Act of 1873 or the Act of 1881 there was no absolute prohibition against the transfer of an interest by a thekadar, the transferability depending on the terms of the contract. It seems to me that although the language is not happy the meaning of sub-clause (3) is that the interest of a thekadar is heritable but not transferable, provided there is no provision to the contrary in the lease.

Sulaiman, J.

The main question to consider is whether the present lease is really a lease for agricultural purposes or not. No doubt the word "thekadar," which was not defined in the Act of 1873 and was defined to include a tenant in 1881 and now includes every farmer or other lessee of proprietary rights under section 4(6), is of a wide scope. But it does not follow that every *theka* is governed by the Agra Tenancy Act. The preamble of the Act indicates that the object of the legislature was to consolidate and amend the law relating to *agricultural* tenancies and certain other matters in these provinces. Under section 108(j) of the Transfer of Property Act a lessee is entitled to transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in property unless the right is clearly not transferable. Section 117 of the Act, however, makes the provision of that section inapplicable to leases for agricultural purposes, unless notified by Government. It is, therefore, important to consider whether the lease in question was or was not a lease for agricultural purposes. If it was not a lease for agricultural purposes, then it would be governed by the Transfer of Property Act and not by the Agra Tenancy Act. Land is defined in section 4

(2) as land which is let or held for agricultural purposes. Sub-clause (6) defines " thekadar " as farmer or other lessee of proprietary rights, which must mean rights in land, otherwise a lessee of proprietary rights in house properties would come within the definition of a thekadar in the Agra Tenancy Act. That obviously could not have been the intention. The expression " agricultural purposes " has not been defined anywhere, but a lease cannot be called a lease for agricultural purposes unless the primary object of the lease is cultivation or agriculture. It is, therefore, necessary to examine the terms of the lease. The lease itself is called a *zar-i-peshgi* lease in perpetuity. The entire village is leased to the lessee who is put in possession thereof and authorized to let out land to tenants and make collections. Clause (3) of the lease provides that the lessee will be entitled to all the income, produce, *mal* and profit arising from *mal*, *sair* items, *sir* land, high and low lands, water and forest produce, tanks and ponds, groves, markets, *baras* (enclosures), land on the banks of the Ganges which may appear or disappear by fluvial action of the river. Although the power of the lessee is described in detail, there is no express mention that he is to cultivate the lands himself. No doubt such power would be implied, but the point is that there is no express mention of any intention on the part of the lessee to cultivate the lands himself. Furthermore, the amounts which are to be paid to the lessor are called instalments of profits, and in case of default of payment interest at the rate of eight annas per cent. per mensem is to run on the amount, which could be deducted from the premium (*zar-i-peshgi*) advanced to the lessor. The lessee is not entitled to plant groves on the land. The lessee is also to be responsible for payment of Government

1926

BALLABH
DAS
T.
MURRAY
NARAIN
SINGH.

Sulaiman, J.

1926

BALLAH
DAS
v.
MURAT
NARAIN
SINGH.

revenue and cesses. Reading the lease as a whole, therefore, it is impossible to say that the primary object of this transaction was agriculture, that is to say, that the entire village was let out to Kalka Prasad Singh for the purposes of cultivation or other agricultural purposes. Part of the village consists of waste and abadi lands and it was not likely that all the area could be brought under cultivation. Having regard to all these circumstances, it is impossible to hold that the lease in dispute in this case was a lease for agricultural purposes so as to be exempted from the operation of section 108 of the Transfer of Property Act and to be governed by the Agra Tenancy Act. The lease is therefore not governed by the Agra Tenancy Act and the rights under it are not non-transferable.

I would allow the appeal and setting aside the order of the courts below dismiss the judgement-debtors' objections with costs in all courts.

MUKERJI, J.—I agree with my learned brother that the judgement-debtors' objection to the execution of the decree must be disallowed.

As pointed out by my learned brother, the main law on the question of transferability of leases is contained in the Transfer of Property Act which is an all-India Act. By that law all leases, except where the terms prohibit, are transferable. Such being the case, the present lease should also be transferable. If there be a prohibition in law, we must see where that prohibition is. In section 117 of the Transfer of Property Act an exception has been made in the case of agricultural leases and it has been laid down that those shall be governed by the local laws where there are any. Such a local law is the Tenancy Act of Agra. Now we have to see whether the lease before us is

governed by the Agra Tenancy Act. We must remember that a lease which is to be exempted from the general provisions of the Transfer of Property Act must be essentially an agricultural lease. If it be not an agricultural lease in its essence, it will not be exempted. My learned brother has already pointed out, and I need not repeat it, that the Tenancy Act is directed to govern agricultural tenancies and not tenancies the object of which is not the promotion of agriculture.

1926

BALLABH
DAS
v.
MURAT
NARAIN
SINGH.

The lease in this case nowhere states that the lessee has taken the land for the purpose of cultivating it himself. There is not a word to that effect. The lease, read as a whole, shows that the zamindar put the lessee in the same position as he himself occupied, except in a few minor matters, in consideration of a small sum of money to be paid to him year by year. The primary object of the lease was to obtain the proprietary rights of the lessor and not to utilize any land for the purpose of agriculture. Of course it would be open to the lessee to cultivate any particular land if he so desired. But that is a secondary object and not the primary object. In this view we cannot treat this lease as a lease of a farm. The word "theikadar" has been defined in the Agra Tenancy Act as including a farmer or other lessee of proprietary rights. The language employed is too wide and it must be conceded that a lessee of a house, although he would be a lessee of proprietary rights, would not be a theikadar within the meaning of the Agra Tenancy Act. Where the primary object of the lease, as in this case, is not agriculture, the lease must be treated as not an agricultural lease.

In this view the interest of the lessee is transferable and saleable in execution of the mortgage decree passed for the purpose.

1926

BALLABH
DAS
v.
MURAT
NARAIN
SINGH.

BY THE COURT.—The appeal is allowed. The decrees of the courts below are set aside and the objection of the judgement-debtors is dismissed with costs in all courts. The execution will proceed.

Appeal allowed.

1926
February,
5.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Boys.

JANGI LAL (DECREE-HOLDER) v. MATA BADAL SINGH
AND OTHERS (JUDGEMENT-DEBTORS).*

Act (Local) No. II of 1903 (Bundelkhand Land Alienation Act), section 16—Civil Procedure Code, section 68—Execution of decree.

The fact that land which is subject to the provisions of the Bundelkhand Land Alienation Act, 1903, happens to be ancestral land will not enable a court to apply section 68 of the Code of Civil Procedure and transfer the execution of a decree affecting it to the Collector for the purpose of his dealing with it in the manner provided by schedule III of the Code. *Hanuman Prasad Narain Singh v. Harakh Narain* (1), referred to.

THE facts of this case were as follows :—

The decree-holder appellant obtained a decree for money against certain members of an agricultural tribe, holding landed property in tahsil Karchhana of the Allahabad district, to which the Bundelkhand Land Alienation Act (Act II of 1903) is applicable. In 1920 he applied for the attachment and sale of the said landed property and got an attachment made; but before he could proceed with the sale of that property, an objection was made by the judgement-debtors that the property was not saleable under section 16 of the Act. That objection was allowed

* Second Appeal No. 1802 of 1924, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 29th of May, 1924, confirming a decree of Triloki Nath, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 24th of March, 1923.

(1) (1919) I.L.R., 42 All., 142.

and the decree-holder was directed to proceed with the execution of the decree in some other way. A fresh application for execution was made by the decree-holder in which he asked for the attachment of the same and some other landed property again and further prayed that after it was attached the decree may be transferred to the Collector of Allahabad for the purpose of farming out the property on lease or making some other arrangements for the recovery of the decretal money. He admitted that the property was not liable to sale under section 16 of the Bundelkhand Land Alienation Act; but he contended that section 68 of the Code of Civil Procedure would apply to the case and that the execution of the decree could be transferred to the Collector because the property in question was ancestral land, for the purpose of dealing with it in the manner provided by Schedule III of the Code of Civil Procedure. The property specified was attached; but the judgement-debtors appeared and objected to its sale; and the court executing the decree upheld that objection and held that, both in view of the order passed in the previous execution proceeding and the operation of the provisions of section 16 of the Bundelkhand Land Alienation Act, it could not direct the sale of the property or transfer the execution of the decree to the Collector under section 68 of the Code. That order was upheld by the lower appellate court.

The decree-holder appealed to the High Court.

Dr. *Kailas Nath Katju*, for the appellant.

Munshi *Harnandan Prasad* for the respondent.

The judgement of the Court (KANHAIYA LAL and Boys, JJ.), after setting out the facts as above, thus continued :—

The Bundelkhand Land Alienation Act was passed with the object of restricting the alienation of

1926

JANGI
LAL
E.
MATA
BADAL
SINGH.

1926

JANGI
LAL
v.
MATA
BADAL
SINGH.

agricultural land by the members of an agricultural tribe or the sale thereof in execution of a decree; and no permanent alienations or mortgages or leases of agricultural land were permitted except in accordance with the terms and conditions laid down in that Act. Section 16 provided that "no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue court made after the commencement of this Act." If the land was not liable to be sold in execution of any decree, it was not open to the court executing the decree to pass an order for its sale; and if no order for sale could be passed, section 68 of the Code of Civil Procedure would be inapplicable. In *Hanuman Prasad, Narain Singh v. Harakh Narain* (1) it was held that where a member of an agricultural tribe, holding agricultural land to which the above Act was applicable, was adjudicated an insolvent, such land could not vest in the receiver because the property was not saleable.

It is urged before us that there was nothing in law to prevent a court from attaching the property; and if it could attach the property, it could also direct its sale and then transfer the proceeds to the Collector for realizing the decretal money otherwise than by a sale of the property attached. But if a sale is forbidden, an order for sale cannot be passed. In fact, no order for sale was passed in this case. The decision of the court below is therefore correct and cannot be disturbed. The appeal is dismissed with costs.

Appeal dismissed.

(1) (1919) I.L.R., 42 All., 142.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

MEWA RAM (DEFENDANT) *v.* RAM GOPAL (PLAINTIFF)
AND HOTI LAL AND OTHERS (DEFENDANTS).*

1926
February,
17.

*Act No. VII of 1913 (Indian Companies' Act), section 4—
Partnership—"Person"—Joint Hindu family.*

For the purpose of reckoning whether a partnership exceeds or not the number of persons prescribed by section 4 of the Indian Companies Act, 1913, a Joint Hindu family as represented by its managing member counts only as one person: it is not necessary to reckon each individual member of the family separately. *Moti Ram v. Muhammad Abdul Jalil* (1), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgement of SULAIMAN, J.

Mr. B. E. O'Connor, Dr. Surendra Nath Sen and Munshi Kamla Kant Varma, for the appellant.

Sir Tej Bahadur Sapru, Dr. Kailas Nath Katju, Munshi Ram Nama Prasad and Pandit Shambhu Nath Chaube, for the respondent.

SULAIMAN, J.—First Appeals Nos. 373 and 374 of 1922 are connected and the same substantial questions of law arise in these appeals. These appeals arise out of two separate suits brought for dissolution of partnership. The substantial pleas raised on behalf of the defendant appellant, Rai Bahadur Lala Mewa Ram, were: (1) that the partnership in question consisted of more than 20 members and was therefore illegal within the meaning of section 4 of the Indian Companies' Act (VII of 1913) and (2) that the partnership being an illegal association, no suit for the dissolution of partnership was maintainable in a court of law. The learned Subordinate Judge has held that as a matter of fact the number of partners

* First Appeal No. 373 of 1922, from a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 10th of August, 1922.

(1) (1924) I. L. R., 46 All., 509.

1926

MEWA
RAM
v.
RAM
GOPAL.

in either of these associations did not exceed 20 and therefore the association was not illegal. In these appeals it is unnecessary for us to express any opinion as to the rights *inter se* of the members of any illegal association because we are satisfied that in neither of these cases the number of partners exceeded 20.

Admittedly the numbers of persons who executed the two deeds of partnership are only 10 and 12, respectively. The only way in which the defendant can urge that the number exceeds 20 is by saying that many of these executants are members of joint Hindu families consisting of a large number of other members and if all the other members of each family were to be counted, the total number exceeded 20. We are of opinion that this is not the right method of calculating the number in order to ascertain whether the association consists of 20 or more members. If each of the executants entered into this partnership in his own individual capacity he admittedly counts as one. On the other hand, if he entered into the partnership in his representative capacity on behalf of his family, then his joint family must be considered to be a unit and must be deemed to be one person within section 4 of the Indian Companies' Act. This view is in accord with the pronouncement of a Division Bench of this Court in *Moti Ram v. Muhammad Abdul Jalil* (1). We, therefore, think that the view taken by the learned Subordinate Judge that the partnerships in question were not illegal associations was correct. There is, therefore, no force in these appeals.

MUKERJI, J.—I entirely agree. I have just one word to add and that is as to the interpretation of section 4 of the Indian Companies' Act (VII of 1913).

Where a person lends his name to a partnership contract he is one of the "persons" constituting the

(1) (1924) I.L.R., 46 All., 509.

total number of partners. Behind his back there may be a joint Hindu family, or he may be representing a firm consisting of himself and several other members. In either case, so far as the other partners are affected, the party joining in the contract is the only person with whom they are concerned. The share owned by the individual member may have to be, in the case of a partition in the family or dissolution of partnership, divided among other persons. But that fact cannot affect the other members in the partnership in question. In this view the party joining constitutes only one person and not more than one person.

By THE COURT.—These appeals are dismissed with costs.

Appeal dismissed.

[See also *Piari Lal v. Muir Mills Co.*, (1) where it was held that the *karta* was the member of the family alone entitled to be registered.—ED.]

REVISIONAL CRIMINAL.

Before Mr. Justice Daniels.

PARAMHANS PANDE *v.* SHEODARSHAN SINGH.*

Criminal Procedure Code, section 146—Applicability of section to parties whose rights in the disputed land have already been determined by civil court.

1926
February
17.

Section 146 of the Code of Criminal Procedure cannot be applied where the civil court has not only determined the rights of the parties, but has also determined the possession so far as it was in its power to do so.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Ambika Prasad Pandey*, for the applicant.

Munshi *Janaki Prasad*, for the opposite party.

* Criminal Revision No. 3 of 1926, from an order of K. G. Banerji, Sessions Judge of Ghazipur, dated the 3rd of December, 1925.

(1) (1919) I.L.R., 41 All., 619.

1926

PARAM-
HANS
PANDE
v.
SHEODAR-
SHAN
SINGH.

DANIELS, J.—This is an application for revision of an order passed under section 146 of the Criminal Procedure Code. The proceedings have been very protracted. It appears that they were first started in December, 1924, on the application of the first party, Babu Sheodarshan Singh and others. The magistrate dismissed the application on the 27th of February, 1925, nearly a year ago, on the ground that section 145 was not applicable. He appears then to have taken proceedings under section 144. These were set aside by the District Magistrate who thought that action under section 145 was the proper course. The proceedings were then re-started and have been concluded by the order under revision. In this order the Deputy Magistrate states that he is unable to determine which party is in possession and he therefore attaches the land and appoints the Tahsildar as receiver.

The pleas urged in revision are, first, that section 145 is inapplicable where neither party is entitled to exclusive possession, and, secondly, that section 146 is inapplicable because the rights of the parties have already been determined by a competent court. The property in dispute consists of a plot of *sir* land, No. 2825, with an area of ten bighas. The first party and Bishan Narain Singh and others of the second party are joint proprietors of the land in the proportion of one-third and two-thirds. The other members of the second party are either mortgagees or permanent lessees. The members of the first party executed a usufructuary mortgage of their one-third share in favour of their co-sharers, the members of the second party. They subsequently sued for redemption and got a decree on the 16th of September, 1922. A year later they got joint possession from the courts. A decree for joint possession is executed in accordance with order XXI, rule 35. It does not entitle the

person obtaining it to actually enter on the land and proceed to cultivate it, or displace the persons who are doing so. It is merely enforced by a proclamation on the property and in the locality, which entitles the persons to whom possession is thus given either to obtain partition or to claim the profits of the property from the person in possession of their share. Although the Deputy Magistrate finds himself unable to determine the question of possession, it appears to me highly improbable that the first party ever obtained any actual possession under this decree. The fact remains, however, that it is difficult to see how section 146 can be applied where the civil courts has not only determined the rights of the parties, but has also determined the possession so far as it was in its power to do so. The civil court having already awarded joint possession to the first party, the only relief for which he could apply to the civil court is a relief which has already been granted to him. It is said that he could apply for a partition of the property. This no doubt is true, but such an application would not be an application to the civil court to determine the title or the right to possession. It would be an application to convert a joint proprietary right into a right of severalty in a portion of the property. In my view, therefore, the order of attachment passed by the court below in this case was not justified by the terms of the section on a reasonable interpretation of it and I set it aside.

Order set aside.

1926

PARAM-
HANS
PANDE
v.
SHEODAR-
SHAN
SINGH.

APPELLATE CIVIL.

1926
February
18.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

OM PRAKASH AND ANOTHER (APPLICANTS) v. MOTI RAM
(OPPOSITE PARTY).*

Act No. V of 1920 (Provincial Insolvency Act), section 28, clause (2)—Insolvency—Joint Hindu family—Whole co-parcenary property vesting in receiver on insolvency of father.

When the father of a joint Hindu family is declared an insolvent, the whole of the co-parcenary property of the family vests in the receiver. *Bawan Das v. Chiene* (1) and *Official Assignee of Madras v. Ram Chandra Ayyar* (2), followed. *Sat Narain v. Behari Lal* (3), distinguished.

THE facts of this case were as follows :—

One Lachhman Das became an insolvent and the official receiver, Babu Moti Ram, took possession of certain property as belonging to the insolvent and sold it. Two sons of the insolvent applied to the District Judge praying for the release and recovery of possession of two-thirds of the property upon the ground that their father's share was only one-third and that share only could be sold. The District Judge, relying on the case of *Bawan Das v. Chiene* (1), rejected the sons' application. They then appealed to the High Court.

Dr. Kailas Nath Katju and Pandit Narmadeshwar Prasad Upadhiya, for the appellants.

Munshi Durga Prasad, for the respondent.

The judgement of MUKERJI, J., after stating the facts as above, thus continued :—

It has been said on the respondent's behalf that in this Court and in other Courts the view has always

* First Appeal No. 76 of 1925, from an order of G. O. Allen, District Judge of Saharanpur, dated the 28th of January, 1925.

(1) (1921) I.L.R., 44 All., 316.

(2) (1922) I.L.R., 46 Mad., 54.

(3) (1925) I.L.R., 6 Lah., 1.

been taken that where a father in a Hindu family governed by the Mitakshara law has been declared an insolvent, the receiver is entitled to sell not only the share of the father that will fall on him on partition, but the entire property in his hand belonging to the whole family consisting of himself and his sons. This view is supported by the ruling of this Court referred to above. The case of *Official Assignee of Madras v. Ramachandra Ayyar* (1) also takes the same view. Let us now consider the Privy Council case quoted by the learned counsel for the appellant. A certain Hindu father, Rai Bahadur Srikishen Das, had two sons. The father was declared an insolvent. Thereafter the sons brought a suit for pre-emption with respect to certain property sold in the neighbourhood. The defence raised was that the father having been declared an insolvent, the entire family property vested in the receiver and that, therefore, the sons had no such right left in the family property as would entitle them to maintain the suit for pre-emption. Their Lordships of the Privy Council considered several sections of the Presidency Towns Insolvency Act (III of 1897) and came to the conclusion that the insolvency of the father did not deprive the sons of their right to maintain a suit for pre-emption. The following words from the judgement will bear quotation:—"It may be that under the provisions of section 52 or in some other way that property (property of the sons) may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee, and no such provision should be read into the Act."

As I read the judgement of their Lordships of the Privy Council, all that was decided was that it might

(1) (1922) I.L.R., 46 Mad., 54.

1926

OM
PRAKASH
v.
MOTI RAM.

Mukerji. J.

1926

OM
PRAKASH
v.
MOTI RAM.

be open to the creditor or the official assignee to proceed against the sons' shares in the family property; but so long as the shares were not sold, the sons would exercise such rights as they might possess by virtue of being the owners of their shares in the family property. As already stated, their Lordships considered the provisions of the Presidency Towns Insolvency Act. In this case we have to consider the provisions of section 28 of the Provincial Insolvency Act (V of 1920). Section 28, clause (2) reads as follows:—"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the court or in a receiver" The question is whether the expression "property of the insolvent" means the property which the insolvent, as the father of his sons, was entitled to call his own and sell it under certain circumstances, or that share which goes to the father in the event of a partition between himself and the sons. On the authority so long prevailing in this Court, we take it that the former meaning is the proper meaning of the word "property" as used there. I find nothing in the Privy Council case which shows that this interpretation would be wrong.

Much has been said as to the inconvenience that would arise from the course that has so long been adopted in this Court; but it is not necessary to discuss that question.

I am of opinion that the petition of the appellants was rightly dismissed, and I would dismiss the appeal with costs.

SULAIMAN, J.—I concur. There can be no doubt that the trend of the authorities so far has been to allow the receiver in insolvency to dispose of the joint family property in lieu of the debts of the father, where the latter has been declared insolvent. I may

refer only to the recent case of *Bawan Das v. O. M. Chiene* (1). It will, therefore, be difficult to depart from this view or to reconsider the point unless these rulings have been overruled either expressly or by implication. The learned advocate for the appellant relies upon the recent pronouncement of their Lordships of the Privy Council in *Sat Narain v. Behari Lal* (2). The only point before their Lordships was whether the effect of the insolvency of the father was to divest the sons of all interests in the joint property so as to deprive them of their right of pre-emption as co-sharers. Their Lordships clearly held that the effect of the insolvency of the father was not at once to vest the entire property in the official receiver. There are, no doubt, some observations on pages 95 and 96 suggesting that, although the words "disposing power" in section 2 may be wide enough to cover a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts, yet the definition of "property" seemed to suggest that what was contemplated was an absolute and unconditional power of disposal.

There is a further point pressed before us that, when their Lordships guarded themselves from saying that the property did not become available for payment of the father's just debts, they referred to section 52 of the Presidency Towns Insolvency Act, corresponding to which there is no express provision in the Provincial Insolvency Act. Section 2 (d) begins by saying that "property includes" It is obvious that it does not contain an exhaustive definition of the term "property." In the Full Bench decision of the Madras High Court in *Official Assignee of Madras v. Rama Chandra Ayyar* (3) the learned Judges based their decision on the combined

(1) (1921) I.L.R., 44 All., 316.

(2) (1925) I.L.R., 6 Lah., 1.

(3) (1922) I.L.R., 46 Mad., 54.

1926 effect of sections 7, 30 and 52 of the Presidency
OM PRAKASH Towns Insolvency Act.

^{v.}
MOTI RAM.

The interests of a father in the entire joint family property extend over the whole property, and it seems difficult to hold that he has no interest in the entire property because if a partition were to take place, the interests of his sons would be cut out and set apart. As, in my opinion, the case decided by their Lordships does not overrule the previous rulings of this Court and other High Courts, I find it impossible to take a different view. The appeal is dismissed with costs.

Appeal dismissed.

[Compare *Allahabad Bank Ltd. v. Bhagwan Das Johari*, p. 343, *supra*.—ED.]

1926
February,
22.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Lindsay.*

MULCHAND NEMI CHAND (DEFENDANT) v. BASDEO
RAM SARUP (PLAINTIFF).*

*Suit for damages—Negligence—Storage of cotton in bulk
without sufficient precautions against fire.*

Defendants hired a large room in the lower storey of a house and therein stored a large quantity of cotton in bales. The room was totally unventilated, and the cotton was left there during the hottest part of the year without any more attention than a perfunctory inspection every few days. Shortly after the commencement of the rains, the cotton caught fire, though from what precise cause was not satisfactorily established, and the house was considerably damaged in consequence.

Held that the defendants were responsible for the damage caused to the plaintiffs' house, inasmuch as the fire would not have happened had they exercised proper watchfulness and

* First Appeal No. 211 of 1922, from a decree of Harihar Prasad, Additional Subordinate Judge of Agra, dated the 25th of April, 1922.

control over the cotton. *Scott v. London Dock Co.*, (1),
Byrne v. Boadle (2) and *Rivers Steam Navigation Co., v.*
Choutmull Doogar (3), referred to.

1926
MULCHAND
NEMI CHAND
v.
BASDEO
RAM
SABUP.

THE facts of this case were as follows:—

The defendants were brokers of Ajmere, and also carried on a business as cotton commission agents at Agra. On the 25th of March, 1920, they had occasion to require premises at Agra to store some 388 bales of cotton, of which 363 bales were the property of a firm called Sukar Nand, Shiam Lal. They hired on a monthly rent a big room on the ground floor of the plaintiffs' house at Belanganj, Agra. The cotton was deposited therein and remained there during April, May and June. It was in evidence that the room was entirely unventilated save for three doors which were almost always closed. In this year (1920) the rains commenced at Agra during July and they had been on for some days when, on the 28th of July, in the afternoon smoke was seen issuing from the room. The alarm was raised, the doors were eventually opened and the cotton was found to be on fire. The fire was not got under until great damage had been done to the upper portion of the house.

The plaintiffs sued the defendants for damages, basing their claim largely on the allegation that the plaintiffs had themselves intentionally set fire to the cotton.

The trial court, though on what precise findings was not altogether clear, gave the plaintiffs a decree for Rs. 12,800. The defendants appealed.

Sir *Tej Bahadur Sapru*, Dr. *Surendra Nath Sen*, Mr. *B. Malik*, Munshi *Baleshwar Prasad* and Munshi *Ajudhia Nath*, for the appellants.

(1) (1865) 34 L. J. (Ex.), 220.

(2) (1863) 33 L. J. (Ex.), 13.

(3) (1893) I.L.R., 26 Calc., 193.

1926

MULCHAND
NEMI CHANDv.
BASDEO
RAM
SARUP.

Mr. *B. E. O'Connor*, Dr. *Kailas Nath Katju* and
Munshi Narain Prasad Asthana, for the respondents.

The judgement of the Court (MEARS, C. J., and LINDSAY, J.), after stating the facts as above and rejecting the plaintiffs' hypothesis of incendiarism, thus continued :—

It is impossible to understand from the judgement whether Mr. Harihar Prasad really thought it a case of incendiarism or that the cotton was ignited by fire brought negligently into contact with it by the servants of defendants, or whether liability should fall on the defendants upon the ground that admittedly a fire broke out on premises occupied by them and under their control under circumstances which put the burden of proving that they had acted in all respects with reasonable care.

In the result he gave the plaintiffs a decree for Rs. 12,800, based not upon a calculation of the amount which it would cost to make good the damage done but on the capital value of the destroyed portion of the house, regarded from the letting point of view.

The defendants alleged that ventilation was given to the room by 3 square sky-lights placed over the doors. It is obvious from the photographs and plans that no such sky-lights ever existed. From the evidence of Nathu Lal (page 84) it is clear that the cotton, once it was stored in the room, was left to itself and all that happened was that a servant on the 2nd or 4th day would go and see it. By going to see it the witness explained that he went to the locked doors without the key and looked through to see if it was all right. It was only when a customer wanted to see bales that the room was opened and there was evidence showing that cotton had slumped so badly that

there were no buyers. No evidence was given to show that the room was ever opened during the tremendous heat of April, May and June, or the rains of July. At page 130 of his judgement the learned Subordinate Judge assumed, because it had been raining, that therefore it could not be a case of spontaneous combustion. A great deal of argument in this Court was addressed to us on the negligence in leaving cotton on the ground floor of a residential house unwatched for months and in an unventilated room. The cotton must have become bone-dry by the end of June and in a condition in which it would eagerly absorb moisture during the rains and the pressure of one damp bale upon another is exactly the very circumstance which gives rise to spontaneous combustion and which has to be guarded against by adequate ventilation, the moving to and fro of the bales, temperature tests and daily watchfulness.

1926
MULCHAND
NEMI CHAND
v.
BASDEO
RAM
SARUP.

The plaintiffs were so set upon running the case of incendiarism that they overlooked the importance of getting expert evidence on the liability of cotton to self-ignition, but we are at liberty to, and do, disagree with the Judge that the fact of wet weather precludes the theory of spontaneous combustion. On the other hand, it indicates the likelihood of it.

We think that the judgement, unsatisfactory as it is on the issues propounded, may yet be supported by his finding at page 132, lines 30 to 40.

We confirm his decision on the ground that the fire which undoubtedly occurred would not have happened had the defendants exercised proper watchfulness and control over the cotton. They had the exclusive control and custody of the cotton and must be presumed to know the degree of care required

1925
MULCHAND
NEMI CHAND
v.
BASDEO
RAM
SARUP.

by persons who store cotton in India in bulk in un-ventilated rooms during the months of April, May, June and July.

The principle of liability is set out in the cases of *Scott v. London Dock Co.* (1), *Byrne v. Boadle* (2) and the Indian case of *The Rivers Steam Navigation Co. v. Choutmull Doogar* (3).

Now as regards the damages. The learned Subordinate Judge was, as we have said, unable to accept the evidence of Janki Prasad—the plaintiff gave the court no help. Mr. Prag Narain, who expounded theories on the way cotton burns when an incendiary has been at work, also gave expert evidence as to the price houses fetch in the locality, based upon a rental calculation. We are of opinion that if the plaintiff had disclosed his books and given the court a straightforward calculation of the total of the cost of the house at the date of the fire and also produced two or three reliable quantity surveyors and builders he might have shown a greater loss than Rs. 12,800. However, he failed to do so, and we propose to leave the damages at the amount awarded by the learned Subordinate Judge.

In view of the manner in which this case was conducted in the lower court we deprive the plaintiff of his costs in that court and, whilst dismissing this appeal, do so also without awarding any costs to the plaintiff respondent.

Appeal dismissed.

(1) (1865) 34 L. J. (Ex.), 220.

(2) (1863) 33 L. J. (Ex.), 13.

(3) (1898) I.L.R., 26 Cal., 393.

APPELLATE CRIMINAL.

Before Mr. Justice Walsh and Mr. Justice Dalal.

EMPEROR v. KALWA AND OTHERS.*

1926
February,
25.

Act No. I of 1872 (*Indian Evidence Act*), sections 30 and 114
—Confession—Corroboration—Presumption.

Amongst the presumptions a criminal court may make is the presumption that an accomplice is unworthy of credit unless he is corroborated in some material particular.

General hostility to the victim cannot be considered to be corroboration of a direct statement connecting an accused with a particular crime. Corroboration must point to the identification of the person charged with the particular act with which the direct evidence connects him.

Where there was nothing in the case of the appellant outside the confession of a co-accused pointing to his complicity in the crime of murder, *held*, that the appellant must be acquitted.

Emperor v. Kehri (1), not applied. *Emperor v. Ashoo-tosh Chuckerbutty* (2), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Sir C. Ross Alston, Mr. F. Owen O'Neill, Mr. K. O. Carleton and Mr. K. D. Carleton, for the appellants.

The Government Advocate (Babu Lalit Mohan Banerji), for the Crown.

WALSH and DALAL, JJ. :—This is an appeal by five men who have been convicted for participation in a murder. Two of the appellants, who are unrepresented, *viz.*, Kalwa, who confessed and whose confession has taken great prominence in the evidence at the trial and in the consideration of the case in court, and Rasila, have been condemned to death. Against

* Criminal Appeal No. 5 of 1926, from an order of Preet Nath Ghose, Additional Sessions Judge of Cawnpore at Banda dated the 23rd of December, 1925.

(1) (1907) I.L.R., 29 All., 434.

(2) (1878) I.L.R., 4 Calc., 483.

1926
EMPEROR
v.
KALWA.

them there is positive evidence, in addition to the confession of Kalwa, going to show that they were seen coming away from the scene of the crime. Bhure Singh, also unrepresented before us, has been convicted under sections 460 and 302, read with section 109 of the Indian Penal Code, and sentenced to transportation for life upon the statement of the confessing accused who testified to his presence at the commission of the crime and whose evidence against Bhure Singh is clearly corroborated in a manner impossible for the appellant to get over. The two remaining appellants, both of whom have been convicted and sentenced to transportation for life, have been found guilty of abetment, in the sense of instigation and counselling, largely also upon the direct evidence of the confession and such other circumstances as the Judge thought sufficient to justify his accepting the confession against these two men. These two men have been represented by counsel: Jagmohan by Mr. *O'Neill*, and Brij Narain by Sir *Charles Alston*, and their cases, no doubt, present some difficulty and have caused us to examine very closely the grounds upon which the learned Judge convicted them. Four other persons were also charged but acquitted, the charge against them being in substance the same as against Jagmohan and Brij Narain, namely, that they were instigators and took part in the preparation and counselling of the crime.

[The judgement proceeded with a discussion of the evidence against the appellants which it is unnecessary to report at length, but the following extract, which deals with the value to be attached to the confession of a co-accused and the corroboration required before such confession can be safely acted upon as against the other accused, is of general importance and is reported below.]

The view we take is this that in declining to apply the legal proposition, which now has stood for many years, laid down in the case of *Emperor v. Kehri* (1), we prefer to follow the view of Chief Justice GARTH, in *Emperor v. Ashootosh Chukerbutty* (2), quoted in the judgement in the case of *Emperor v. Kehri* (1), to the view taken by the members of the Court in *Kehri's* case. As a matter of fact, if it has not already been pointed out, it is as well to point out that in the judgement in *Kehri's* case in the passage where Mr. Justice KNOX differs from Chief Justice GARTH and gives his reasons for so doing, he has committed himself to a mis-statement of fact with reference to the confession having been made in the presence and hearing of the co-accused. We prefer to follow the old established practice,—a practice almost invariably followed throughout India even by those who accept the decision in the order against *Kehri*—, which is well expressed in illustration (b) to section 114 of the Evidence Act, namely, that amongst the presumptions a court may make is the presumption that an accomplice is unworthy of credit, unless he is corroborated in material particulars. That is a direction of law or of practice—it matters not which—which we ourselves should give to every jury in any case in which we had to direct them upon the law and which in matters of fact we ourselves should follow. Applying that principle to the case of Jagmohan, we accept Mr. O'Neill's contention that there is nothing in the case outside the confession pointing to his complicity in this particular crime. The existence of general enmity and a desire, however strong, or a motive however effective, to procure the death of another person may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime. Corroboration must

1926

EMPEROR
v.
KALWA.

(1) (1907) I.L.R., 29 All., 454.

(2) (1878) I.L.R., 4 Cal., 483.

1926
EMPEROR
v.
KALWA.

point to the identification of the person charged with the particular act with which the direct evidence connects him.

MISCELLANEOUS CIVIL.

1926
February,
26.

Before Mr. Justice Lindsay and Mr. Justice Mukerji.

BACHHAN (PLAINTIFF) v. THE MUNICIPAL BOARD OF
MIRZAPUR (DEFENDANT).*

Act No. VII of 1870 (Court Fees Act), section 7 (iv) (d)—Act No. VII of 1887 (Suits Valuation Act), section 8—Suit for declaration of title and for an injunction—Valuation for computation of court fees and for purposes of jurisdiction.

Plaintiff sued (a) for a declaration of his title as to a certain plot of land and (b) for an injunction restraining the defendant from interfering with the construction of a *chabutra* which he desired to erect on the land in question. He valued his suit at Rs. 1,100 for the purposes of jurisdiction and paid a court fee of Rs. 20, *viz.*, Rs. 10 for the declaration of title and Rs. 10 for the injunction sought.

Held that as regards the claim for an injunction the proper court fee payable should be an *ad valorem* fee calculated on the valuation given by the plaintiff for the purpose of jurisdiction.

This was a reference as to the correct amount of court fee payable on a plaintiff's suit and two appeals. The facts out of which the reference arose appear from the judgement of the High Court.

Dr. Kailas Nath Katju, for the appellant.

Mr. Sankar Saran, for the respondent.

LINDSAY and MUKERJI, JJ.:—The suit was brought for the purpose of obtaining a declaration of title regarding a certain piece of land in Mirzapur

* Stamp Reference in Second Appeal No. 1894 of 1925.

and for the declaratory relief a court fee of Rs. 10 was paid. Further relief was sought in that the plaintiff asked the court to issue a perpetual injunction restraining the Municipal Board of Mirzapur from interfering in any way with the construction of a *chabutra* which the plaintiff desired to erect on the land in question.

1926

BACHHAN
v.
THE
MUNICIPAL
BOARD
OF
MIRZAPUR.

In paragraph 7 of the plaint we find the following :—

“ For purposes of jurisdiction the value of the thing claimed is Rs. 1,100 and for payment of court fee it is Rs. 10, in respect of declaration, and Rs. 10 for the issue of an injunction.”

As regards the relief by way of declaration there can be no dispute. As regards the court fee payable for relief by way of an injunction, that is regulated by section 7(iv) (d) of the Court Fees Act which lays down that in a suit to obtain an injunction the court fee shall be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

We have to read this along with section 8 of the Suits Valuation Act, VII of 1887, according to which in suits of the class we are now considering the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same. In this case, for purposes of jurisdiction the plaintiff valued what he calls the “ thing claimed ” at Rs. 1,100 and consequently the suit was instituted in the court of the Subordinate Judge. It seems to us, therefore, that having regard to the provisions of the two sections just mentioned the plaintiff was bound to pay a court fee for relief by way of injunction on the valuation of Rs. 1,100 and that is what the office has reported. We direct the appellant to make good the deficiency, for which we allow a month.

APPELLATE CIVIL.

1926
March, 2.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

HARI CHAND RAI (APPLICANT) v. MOTI RAM
(RECEIVER).*

Act No. V of 1920 (Provincial Insolvency Act), sections 53 and 4—Insolvency—Application by receiver to declare on ostensible transfer executed by the insolvent to be void—Transfer more than two years old—Act No. IV of 1882 (Transfer of Property Act), section 53.

The limitation of two years prescribed by section 53 of the Provincial Insolvency Act, 1920, is applicable to all cases where the transfer, when originally made, was a good transfer of property though it was subject to an option of avoiding it, to be exercised by the receiver. But such a transfer is only voidable and not void and remains good so long as it is not annulled by the court. On the other hand a transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled. All that the court has to do in such a case is to decide that it is void, which decision will bind the claimant to the property as if it were by an ordinary civil court.

So held by SULAIMAN, J., (MUKERJI, J., dissenting).

Per MUKERJI, J.—An insolvency court has no jurisdiction to entertain an application of the receiver to declare an ostensible transfer void within the meaning of section 53 of the Provincial Insolvency Act, 1920, if the transaction took place more than two years before the adjudication.

Shikri Prasad v. Aziz Ali (1), *Gaura v. Nawab Muhammad Abdul Majid* (2), and *Bansidhar v. Kharagjit* (3), referred to.

THIS was an appeal arising out of an application made by a receiver in insolvency. The receiver alleged that some time before the adjudication the insolvent had made an entirely fictitious lease of the greater part of his property at a nominal rent in

* First Appeal No. 38 of 1925, from an order of G. O. Allen, District Judge of Saharanpur, dated the 6th of November, 1924.

(1) (1921) I.L.R., 44 All., 71.

(2) (1920) 64 Indian Cases, 523.

(3) (1914) I.L.R., 37 All., 65.

favour of his brother-in-law, Hari Chand Rai, and he asked that the lease might be annulled and the property covered by it put in his possession. The application originally was one under section 53 of the Provincial Insolvency Act, 1920; but, on an objection being raised that that section could not be applied as the transaction in question took place more than two years before the adjudication, the receiver asked the court to treat his application as one made under section 53 of the Transfer of Property Act, 1882. The District Judge went into the facts of the case and found that the transaction impugned was entirely a fictitious one, which was never intended to be carried into effect, and was not, for the lessor remained in possession all along and there was nothing to show that the lessee ever at any time had effective possession of the property leased. He accordingly gave the receiver the declaration which he asked for.

1926

HARI
CHAND
RAIv.
MOTI RAM

The lessee appealed to the High Court.

Dr. *Kailas Nath Katju* and Pandit *Narmadeshwar Prasad Upadhya*, for the appellant.

Munshi *Durga Prasad*, for the respondent.

The judgement of SULAIMAN, J., after stating the facts and expressing agreement with the finding of the court below that the transaction in dispute was a totally fictitious one, thus continued:—

The learned advocate for the appellant contends before us that it was not open to the insolvency court to go into this matter at all. If the petition of the receiver were to be construed strictly and he were pinned down to the section under which it was made, there may be something to be said in support of this contention; but there is no doubt that allegations made in the petition, although the wrong section was quoted, amounted to an assertion that the transaction was a wholly fictitious one and was in no way

1926

HARI
CHAND
RAI
v.

MOTI RAM.

Sulaiman, J.

binding on the insolvent. In view of this circumstance I am of opinion that the finding of fact arrived at by the District Judge was not improper.

The question remains whether it was open to the insolvency court to go into this matter at the instance of the receiver. The learned vakil for the respondent has strongly relied on the case of this Court, *Shikri Prasad v. Aziz Ali* (1), where two learned Judges expressed the view that the insolvency court has to apply and decide all questions of general law, including such questions as are raised by section 53 of the Transfer of Property Act. After expressing this opinion, the learned Judges remanded the case for disposal of the question that was raised. It may, however be pointed out that documents, which are voidable under section 53 of the Transfer of Property Act are good in law so long as the option to avoid them is not exercised by the creditors who are defrauded. A prayer to avoid such voidable documents does not necessarily raise a question of title or of priority mentioned in section 4 of the Provincial Insolvency Act of 1920. As to whether it is covered by the wider expression "of any nature whatsoever" I would require further consideration before expressing any final opinion. It, however, seems to me that there is nothing to prevent an insolvency court from going into the question of title and holding that a certain document executed by the insolvent is not only voidable but really void, being fictitious. If a document which is never intended to take effect and which in law does not pass title is void *ab initio*, the property remains vested in the insolvent and belongs to him. Any person who puts forward a claim to such property is a claimant to it and raises a question of title. I am, therefore, unable to hold that the

(1) (1921) I.L.R., 44 All., 71.

receiver cannot at his own instance have such a question of title decided by an insolvency court. Even prior to Act V of 1920, when there was no provision corresponding to section 4 of the new Act, a Bench of this Court held that, even if a case did not fall under section 36 of the old Provincial Insolvency Act, the Court had power to inquire whether a disputed property was the property of the insolvent or not, vide *Bansidhar v. Kharagjit* (1). As pointed out by me in the case of *Maharana Kunwar v. E. V. David* (2), there was a conflict of opinion between this Court and the Calcutta High Court, the view prevailing in the latter court being that a question of title could be disposed of by a regular suit only. The enactment of section 4 gives effect to the view which prevailed in this Court. Under that section, full power is given to the insolvency court to decide not only all questions of title or priority, but also of any nature whatsoever, whether they involve matters of law or fact, which may arise in any case of insolvency coming within the cognizance of the court or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice. It seems, therefore, that the insolvency court has full power to declare, even though it be at the instance of the receiver, that certain property belongs to the insolvent and that any other person, who is putting forward a claim to it, is not really entitled to it. This by no means implies an annulment of a voidable transfer within the meaning of section 53 of the Provincial Insolvency Act. The limitation of two years, prescribed under section 53, is applicable to all cases where the transfer, when originally made, was a good transfer of property though it was subject to an option of avoiding it, to be exercised by the receiver. But such a transfer

1926

HARI
CHAND
RAI
v.

MOTT RAM.

Sulaiman, J.

(1) (1914) I.L.R., 37 All., 65.

(2) (1923) I.L.R., 46 All., 16 (21).

1926

HARI
CHAND
RAI
v.
MOTI RAM

is only voidable and not void and remains good so long as it is not annulled by the court. On the other hand, a transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled. All that the court has to do in such a case is to decide that it is void, which decision will bind the claimant to the property as if it were by an ordinary civil court. In this view of the matter, I am unable to hold that the court below has acted without jurisdiction in recording its finding that the transfer is wholly fictitious and not binding on the insolvent or the receiver. I would, therefore, dismiss the appeal.

MUKERJI, J.—While I agree entirely with my learned brother on the question of fact, I have the misfortune to disagree with him on the question of law. I agree that the transaction in the present case was a fictitious one and was only a cloak to protect the insolvent Lachman Das's property from being taken in execution of decrees. But the matter does not end there.

The receiver sought the aid of the insolvency court by a petition setting forth that the transaction was voidable as against him and asking that under section 53 of the Insolvency Act it might be avoided. It was pointed out on behalf of the transferee, the lessee, that the transaction had taken place more than two years prior to the adjudication of the insolvent and that therefore it was beyond the jurisdiction of the insolvency court to touch the transfer. The learned Judge was of the same opinion. But he allowed the petition of the receiver to be treated as a suit under section 53 of the Transfer of Property Act. He accordingly took cognizance of the petition and having heard the case, came to the conclusion already stated.

I have given the point raised my best consideration and I am clearly of opinion that an insolvency court has no jurisdiction to entertain an application of the receiver to declare an ostensible transfer void within the meaning of section 53 of the Insolvency Act if the transaction took place more than two years before the adjudication.

1926

HARI
CHAND
RAI

MOTI RAM.

Mukerji, J.

It is clear that section 4 of the Insolvency Act is controlled by the opening words "subject to the provisions of this Act." The question is whether an adjudication of a question of title is or is not controlled by the provisions of sections 53 of the Insolvency Act. It has been urged on behalf of the respondent that section 53 would apply to the case of a transfer which would be good enough unless challenged by the receiver, but would not apply where the transfer is void *ab initio* and in fact is fictitious, giving no title to the ostensible transferee.

This alleged distinction, in my opinion, does not exist so far as section 53 of the Insolvency Act is concerned. All that it lays down is this, that a receiver can ask the insolvency court to declare as of no effect certain transactions which appear to be on the face of them transfers. The section has nothing to do with the distinction between a transaction which is void *ab initio* and a transaction which is voidable at the option of a party. Indeed, in the case of transfers by debtors, either they are meant to operate *bonâ fide* or they are meant to be mere cloaks for the protection of the debtors' property. So far as I am aware there is no third class. Either the property is to be protected from the creditors or the property is to be taken by the ostensible transferee as under a real transfer. Where a transfer is meant to be good and is *bonâ fide* no title whatever remains in the transferor, the debtor, and the property passes beyond the control of the debtor

1926
 HARI
 CHAND
 RAI
 v.
 MOTI RAM,

Mukerji, J.

and also of the receiver in insolvency. Where the transfer is a mere cloak for the protection of the debtor's property, the creditors and also the receiver can seek proper remedy for a declaration of the character of the transfer. The question is as to the forum where the creditor or the receiver will seek his remedy. In my opinion section 53 of the Insolvency Act declares that so far as the receiver is concerned he can seek the relief in the insolvency court, provided the transaction is within two years, as already mentioned. If the transaction is beyond two years, he must seek his remedy by an ordinary civil suit instituted under section 53 of the Transfer of Property Act..

As for authority. The only authority that has been produced before us by the learned counsel for the receiver is the case of *Shikri Prasad v. Aziz Ali* (1). In that case no distinction, as has been sought to be drawn on behalf of the respondent, was drawn. The case decided that it was open to an insolvency court to try questions raised under section 53 of the Transfer of Property Act. The court was not called upon to decide what would be the effect of section 53 of the Insolvency Act in particular cases. In my opinion this case is no authority on the question which we have now to decide. On the other hand, in the case of *Gaura v. Nawab Muhammad Abdul Majid* (2), two learned Judges of this Court (one of whom was on the Bench which decided the case in I. L. R., 44 Allahabad) held that where the transaction was more than two years old, it was not open to the insolvency court to scrutinize it under the provisions of section 53 of the Transfer of Property Act. It is true that the learned Judges considered the provisions of section 36 of the Insolvency Act of 1907 and they had

(1) (1921) I.L.R., 44 All., 71.

(2) (1920) 64 Indian Cases, 523.

not to construe the present Act. But in my opinion that is no distinction, because section 53 of the present Insolvency Act is a pure reproduction of the old section 36 of the Act of 1907, and section 4 of the present Act is subject to the provisions of section 53.

1926
HARI
CHAND
RAI
v.
MOTI RAM

I may point out that if the question of limitation and jurisdiction that has been raised in this case has to be determined after a trial on the merits of the question raised, no utility will be left for a section like section 53 of the Insolvency Act. One party, the receiver, would assert that the transfer is fictitious, pure and simple, and that it did not pass any title to the transferee and that therefore a declaration to that effect should be made by the court. The other party, the ostensible transferee, would assert that it is a good transfer and that he has been holding the property for more than two years in good faith. The preliminary question of limitation and jurisdiction cannot be decided without the court going fully into the merits of the case and finding whether the transaction is a good one or a bad one. This I think could not have been contemplated by the framers of section 53 of the Insolvency Act.

I would, therefore, allow the appeal, set aside the decree of the court below and dismiss the receiver's application with costs.

BY THE COURT.—The appeal is accordingly dismissed, but as it raised a difficult question of law, we direct that the parties should bear their own costs of this appeal.

Appeal dismissed.

1926
March, 2

Before Mr. Justice Walsh and Mr. Justice Dalal.

RAJ BAHADUR (DEFENDANT) *v.* NARAIN PRASAD
AND OTHERS. (PLAINTIFFS).*

Civil Procedure Code, order XXII, rule 5—Determination that a certain person is not the legal representative of a deceased party—Res judicata.

Where it has once been decided in a proceeding under order XXII, rule 5, of the Code of Civil Procedure that a certain person is (or is not) the legal representative of a deceased party, the same question cannot be re-agitated in a separate suit. *Parsotam Rao v. Janki Bai* (1) and *Raoji Bhikaji v. Anant Laxman* (2), referred to.

. THE facts of this case were as follows :—

One Chhotey Lal had two sons, and the widow of one of them, Musammat Ganeshi, made certain transfers in favour of Raj Bahadur. Musammat Ganeshi had a daughter, Musammat Katori, who was the heir to the property on the death of her mother. She instituted a suit in 1917 for a declaration that the transfers were beyond the power of a Hindu widow and were not binding on her. During the pendency of the suit she died, on the 12th of November, 1917. Narain Prasad applied to the court to be brought on the record as representative in interest of Musammat Katori on the ground that Musammat Katori had given birth to a son who died the day after he was born and Narain Prasad was successor in interest of his wife through that son. On the question whether Narain Prasad was or was not the legal representative of Musammat Katori, the finding of the court was that no son was born to Musammat Katori and that Narain Prasad was not her legal representative. The suit therefore abated and was dismissed. Prior to the dismissal of the suit Narain Prasad, who claimed the property, and the sons of Durga Prasad,

* First Appeal No. 88 of 1925, from an order of Aghor Nath Mukerji, Additional District Judge of Bareilly, dated the 16th of February, 1925.

(1) (1905) I.L.R., 28 All., 109.

(2) (1918) I.L.R., 42 Bom., 535.

brother of Musammat Ganeshi's deceased husband, had referred the question in dispute to arbitration and an award was passed in favour of Narain Prasad. This award had been passed before the dismissal of Musammat Katori's suit; the award, however, was not pleaded in support of Narain Prasad's application. After the dismissal of his application Narain Prasad filed the present suit against Raj Bahadur for a declaration that the transfers made by Musammat Ganeshi were invalid and inoperative, and also for possession. The trial court dismissed the suit on the finding that it was barred by the principle of *res judicata*. On appeal, the Additional District Judge disagreed with this finding and remanded the suit for trial. Against this order the defendant appealed.

1926

RAJ
BAHADUR
v.
NARAIN
PRASAD

Munshi *Sarkar Bahadur Johari*, for the appellant.

Mr. *B. Malik* and Dr. *Surendra Nath Sen*, for the respondents.

The judgement of the Court (WALSH and DALAL, JJ.), after stating the facts as above, thus continued :—

We are of opinion that the proceedings in the suit of Musammat Katori subsequent to her death bar the present suit of the plaintiff. The court which heard Musammat Katori's suit was entitled under order XXII, rule 5, to decide the question whether Narain Prasad was or was not the legal representative of Musammat Katori and the decision would be binding on the parties. On behalf of the respondent reference was made to the case of *Parsotam Rao v. Janki Bai* (1). The facts of the case do not appear very clearly from the judgement and it is not clear whether the

(1) (1905) I.L.R., 28 All., 109.

1926

RAJ
BAHADUR
v.
NARAIN
PRASAD.

learned Judges desired to decide or not that once the question of a legal representative was decided by a court under order XXII, rule 5, it could be re-adjudicated upon in a regular suit. Reference is there made to some vital issue arising in that case—whether two Hindu brothers were separate or were members of a joint Hindu family. If the learned Judges desired to decide that a question once determined under order XXII, rule 5, would not operate as *res judicata*, we are not prepared to follow that opinion, with all respect. In a Bombay case, *Raoji Bhikaji v. Anant Laxman* (1), a Bench of that Court held that where a party died between the passing of a preliminary decree and a final decree in a suit for partition and the cause of action survived, the court was bound to determine the question of the successor in interest of the deceased party under order XXII, rule 5, and decide such dispute without referring the parties to a separate suit.

As to the award, Narain Prasad ought to have pleaded it in support of his right to be brought on the record as representative in interest of Musammat Katori. The words of section 11 of the Code of Civil Procedure, explanation IV, are :—“ Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit ”. It must therefore be taken that in the suit of Musammat Katori a court having jurisdiction decided that Narain Prasad was not her representative in interest either through her son or on the basis of an award given by arbitration in a dispute between himself and the sons of Durga Prasad. We have already held that such a finding is binding on the parties.

(1) (1918) I.L.R., 42 Bom., 535.

We decree the appeal, restore the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs of all the courts.

Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Lindsay.

1925
March, 2.

SHEO DARSHAN SINGH (OPPOSITE PARTY) v. BENI
CHAUDHRI AND OTHERS (APPLICANTS).*

Mortgage—Suit for redemption—Costs awarded by appellate court—Failure to deposit in time—Charge on mortgaged property.

Where in a suit for redemption of a mortgage the appellate court increases the amount of the costs payable by the plaintiff, such costs, in the absence of any direction to the contrary, form part of the money chargeable on the mortgaged property, and if they are not paid within the time limited the plaintiff is not entitled to possession. *Amin-i Bibi v. Ram Shankar Misra* (1), followed.

THE facts of this case were as follows:—

Babu Sheo Darshan Singh brought a suit for redemption of a mortgage and obtained on the 22nd of April, 1919, a preliminary decree. The court found that the plaintiff had to pay for redemption a sum of Rs. 1,747-8-6 for principal and interest and Rs. 69-2-0 for costs, making a total of Rs. 1,816-10-6.

The item for costs just referred to included only two-thirds of the costs incurred by the defendants mortgagees.

This sum was deposited by the plaintiff mortgagor in court and on the 26th of June, 1919, a final decree under order XXXIV, rule 8, was passed. On the 15th of July, 1919, the plaintiff was put in possession of the mortgaged property.

Meanwhile the mortgagees appealed against the preliminary decree and on the 2nd of December, 1920,

* Appeal No. 31 of 1925, under section 10 of the Letters Patent.
(1) (1919) I.L.R., 41 All., 473.

1926

SHEO
DARSHAN
SINGH
v.
BENI
CHAUDHRI

the appellate court varied the preliminary decree by directing the payment of a larger sum and also by giving direction for payment of certain costs. The time for payment was extended by the appellate decree to the 2nd of March, 1921. Before this latter date the plaintiff did deposit in court an extra sum of Rs. 175, making a total of Rs. 1,991-10-6. There was, however, due from him under the appellate decree a further sum of Rs. 45-6-0 in respect of costs, and this sum he did not pay before the date in question.

On the 18th of June, 1921, the mortgagees applied to the court and asked to be restored to possession of the mortgaged property, on the grounds that the decree of the appellate court had modified the decree of the court of first instance and that the full sum payable by the plaintiff mortgagor had not been deposited in court. The mortgagee also asked for mesne profits for the period covered by the plaintiff's possession. The defendants got an order for re-delivery of possession and also got an order entitling them to Rs. 800 as mesne profits for two years. The plaintiff then appealed on the ground that he had in effect complied with the terms of the appellate decree and was not liable to re-deliver possession to the mortgagees. In other words, his plea was that the payment of the above mentioned sum of Rs. 45-6-0 was not a condition precedent to his obtaining redemption and his being entitled to retain possession of the mortgaged property.

The plaintiff's appeal was dismissed and he filed a second appeal to the High Court, and it came before a Bench, the Judges composing which differed in opinion: MUKERJI, J., held on a construction of the decree that the costs awarded by the lower appellate court were not chargeable on the mortgaged property, whilst DANIELS, J., held that they were, on the

strength of the ruling in *Dambar Singh v. Kalyan Singh* (1) and *Amina Bibi v. Rama Shankar Misra* (2).

1926
SHEO
DARSHAN
SINGH
v.
BENI
CHAUDHRI.

The appeal was therefore dismissed.

The plaintiff appealed under section 10 of the Letters Patent from the judgement of DANIELS, J.

Munshi *Shiva Prasad Sinha* (for Munshi *Hari-bans Sahai*), for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondent.

The judgement of the Court (MEARS C. J., and LINDSAY, J.) after stating the facts as above thus continued :—

The question arose, therefore, whether this sum of Rs. 45-6-0, costs awarded in appeal, was a charge on the mortgaged property. Was this sum added to the mortgage money? The two learned Judges of this Court have differed in their opinion regarding this matter. It appears to us, however, that the view taken by Mr. Justice DANIELS is the correct view and that as a matter of law this sum of Rs. 45-6-0 was a charge on the mortgaged property. It is true that in the decree of the appellate court there was some confusion regarding the order for costs. The appellate court was of opinion that the defendants mortgagees were entitled to their full costs in the court of first instance, that is to say, to a sum over Rs. 100 and it made an order accordingly. It laid down that the plaintiff mortgagor was liable to pay Rs. 1,991-10-6 by the 2nd of March, 1921, and then went on to give further directions regarding costs. Both sides admit that as framed the additional order regarding costs was erroneous in respect of the amount specified, but there is no dispute whatever that a sum of Rs. 45-6-0 was payable by the mortgagor under the appellate court's decree. The

(1) (1917) I.L.R., 40 All., 109.

(2) (1919) I.L.R., 41 All., 473.

1926

SHEO
DARSHAN
SINGH
v.
BENI
CHAUDHRI

question, whether costs awarded in the manner just referred to were a charge on the mortgaged property, is one regarding which the law is well settled and in this connexion we may refer to the statement of the law laid down in Ghose's Law of Mortgage in India, 4th edition, volume I, page 619. Speaking of redemption the learned author says: "But the costs of the action will, as a rule, be only added to the amount of the security; and the mortgagor will be made personally liable for them only in very exceptional cases of misconduct". The learned author goes on to say that it is certainly competent to the court in the exercise of its discretion to award the costs personally against the mortgagor, but where the terms of the decree are ambiguous it ought not to be construed in such a manner as to enable the mortgagee to realize his costs personally from the mortgagor. The law has been laid down in the same sense in a case in this Court, *Amina Bibi v. Ram Shankar Misra* (1). We think, therefore, that the interpretation put upon this decree by Mr. Justice DANIELS was a correct one and in accordance with the law as explained above. It follows, therefore, that the mortgagor, having failed to make a deposit in court of the full sum charged upon the property, was not entitled to retain possession as against the mortgagees after the decree had been passed in appeal. We approve of the view taken by Mr. Justice DANIELS and dismiss this appeal with costs.

Appeal dismissed.

(1) (1919) I.L.R., 41 All., 473.

Before Mr. Justice Walsh and Mr. Justice Dalal.

1926
Merch. 9.

BABU LAL (DECREE-HOLDER) *v.* JANAK DULARI AND
ANOTHER (JUDGEMENT-DEBTORS).*

*Civil Procedure Code, section 47—Execution of decree—
Question whether alleged legal representative does or does
not occupy that capacity—Execution court entitled to
decide.*

The provisions of section 47 of the present Code of Civil Procedure make it quite clear that the question whether or not an alleged legal representative does or does not occupy that capacity so as to be bound by the decree is one to be decided in the execution court. The question raised by such cases is, what is the true interpretation of the decree, and in order to decide that question it is necessary to investigate, in the case of a Hindu widow, the circumstances under which the contract was entered into upon which the decree was based. *Liladhar v. Chaturbhuj* (1), *Khuman Singh v. Makhan Singh* (2) and *Jagar Nath v. Sheo Ghulam* (3) referred to.

THE facts of this case were as follows :—

One Maheshi Lal left a widow surviving him, who executed two mortgages under circumstances which are not known, and which have never been investigated upon the question whether the loan taken by the widow was either for legal necessity, or for some other purpose which by Hindu law binds the estate. The mortgagee, shortly before the death of the widow, sued her and obtained a decree for sale. On the death of the widow, or some little time afterwards, he applied for execution, and sought to join, or bring on the record, two daughters of the deceased widow and of their father, the deceased Maheshi Lal, on the ground that they were the legal representatives of the deceased widow. They objected. Their objection took the obvious form that they were not the legal representatives of their deceased mother

* First Appeal No. 142 of 1925, from an order of Sarup Narain, Second Subordinate Judge of Cawnpore, dated the 13th of May, 1925.

(1) (1889) I.L.R., 21 All., 277.

(2) (1908) 5 A.L. J., 550.

(3) (1908) I.L.R., 31 All., 45.

1926

BABU
LAL
v.
JANAK
DULARI.

because there was nothing to represent. They were the legal representatives, or reversioners, of their deceased father and the decree against the widow could have no more binding effect than the mortgage contract which she had entered into in her capacity as a Hindu widow with a Hindu widow's estate. The Munsif rejected this objection, taking the view that they were the legal representatives of the widow and that in questioning whether the decree was binding upon the estate in the hands of the reversioners, they were seeking to go behind the decree in the execution court. On an appeal brought to the Subordinate Judge this view was overruled, the Subordinate Judge holding that in substance the decision of the first court really begged the whole question, and that the daughters were entitled to contest the view in the execution court that they were legal representatives of their deceased mother, inasmuch as it had never been decided whether the mortgage, or the decree based thereon, bound the whole estate, or anything more than the interest of the Hindu widow. He accordingly remitted the case to enable that question to be decided. Against this order the decree-holder appealed.

Munshi *Binode Bihari Lal*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

The judgement of the Court (WALSH and DALAL, JJ.), after setting forth the facts as above, thus continued :—

With regard to the contention that the daughters are seeking to go behind the decree it should be observed that this is not the case. What they are seeking to do is to interpret the decree, or, in other words, to ascertain whether the decree is such as to bind the whole estate, or whether it only bound the interest

of the widow. That question has never been determined. For one reason, the reversioners were not made parties to the suit in which the decree was passed, and unless the widow herself chose to raise the question which she was not very likely to do, it would not arise at all, and therefore the fundamental question, namely, whether the contract was such as to bind the whole estate or not when it was originally made by the widow, has never been determined, and it would be contrary to all principles of law and justice if the courts were to give a wider interpretation and operation to a decree than the contract upon which it was based.

1926

BABU
LAL
v.
JANAK
DULARI.

The appellant before us relied upon the decision in *Liladhar v. Chaturbhuj* (1) but the decision in that case turned upon a very narrow question. The objectors in that case disputed their liability as judgment-debtors, not having resisted an order bringing them upon the record as legal representatives of the deceased judgement-debtor, and the case decides nothing more than the well-known principle that a judgement-debtor, or his legal representative, cannot go behind the decree, or dispute the validity of a contract upon which a decree has been passed. That authority was clearly explained in *Khuman Singh v. Makhan Singh* (2), a case which certainly should have been, but which appears not to have been, published in the authorized Law Reports, but it should be observed with regard both to this case, and to the preceding one to which we have already referred, that these decisions were under the old law as provided by section 244 of the Code of 1882 and therefore have little or no application to the legal position to-day. The opinion was expressed in those cases, and it was

(1) (1889) I.L.R., 21 All., 277.

(2) (1908) 5 A.L. J., 550.

1926

BABU
LAL
v.
JANAK
DULARI.

definitely held in *Jagar Nath Singh v. Sheo Ghulam* (1), that a suit might be brought by a reversioner disputing the operation of the decree where it was contended that it bound the whole estate, and that the old section 244 constituted no bar. But the old section 244 has been altered and the provisions of section 47 of the present Code make it quite clear that the question whether or not an alleged legal representative does or does not occupy that capacity so as to be bound by the decree, is one which is to be decided in the execution court. That is precisely the question raised by this appeal. We repeat that it does not offend against the principle that an execution court cannot go behind the decree. The question raised in this and cognate cases is, what is the true interpretation of the decree, and what is its operative effect, and in order to decide that question it is necessary to investigate, in the case of a Hindu widow, the circumstances under which the contract was entered into upon which the decree is based.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

1926
March, 16.

Before Mr. Justice Walsh and Mr. Justice Dalal.

RAM SAHAI (APPLICANT) v. MADAN LAL KANHAIYA
LAL AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, section 115; order XXI, rule 16—Execution of decree—Assignment by way of mortgage—Revision—Subordinate court following a ruling that has no application.

Although a court subordinate to a High Court is bound to follow the rulings of such High Court, where they are applicable, yet where a subordinate court gave an entirely

* Civil Revision No. 96 of 1925.

(1) (1908) I.L.R., 31 All., 45.

wrong decision through purporting to follow a ruling which had no application to the case before it, it was *held* that a revision would lie from the decision so arrived at.

Order XXI, rule 16, of the Code of Civil Procedure applies to an assignment of a decree by way of mortgage, and it is not necessary for its operation that the whole of the decree-holder's interest in the decree should be transferred.

Kishore Chand Bhakat v. Gisborne & Co. (1) and *Endoori Venkataramaniah v. Venkatachainulu* (2), referred to.

Where on the subject-matter there is a current of authorities one way in other High Courts and a current of authorities the other way in the High Court to which he is subordinate, a Subordinate Judge cannot be said to have gone outside his jurisdiction or to have exercised it irregularly, in following the decisions of his own High Court by which he is bound when they are in *pari materia*, but if he has a doubt about the decision of his High Court he might refer the matter to the decision of the High Court. *Yad Ram v. Sundar Singh* (3), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of WALSH, J.

Dr. *Kailas Nath Katju* and *Shambhu Nath Seth*, for the applicant.

Babu *Piari Lal Banerji*, for the opposite parties.

WALSH, J.—We have come to the conclusion that this case must go back. We make it quite clear that we are interfering under section 115 of the Civil Procedure Code on the ground that the learned Judge has not exercised the jurisdiction vested in him in hearing this application on the merits, but we desire to point out that so far as the application of section 115 to this case is concerned, the members of the Court do not take precisely the same view, and the decision at which we have arrived is based on the peculiar circumstances of this case and cannot be regarded as a guide in any other.

(1) (1889) I.L.R., 17 Cal., 341.

(2) (1909) I.L.R., 33 Mad., 80.

(3) (1923) I.L.R., 45 All., 425.

1926

RAM
SAHAI

P.

MADAN
LAL
KANHAIYA
LAL.

1926

RAM
SAHAI
v.
MADAN
LAL
KANHAIYA
LAL.

Walsh, J.

The facts are simple. The present applicant before us, on the 15th of December, 1924, applied to the execution court in a suit to which he was not a party, alleging that having experienced great difficulty in recovering from one Kanhaiya Lal a sum due to him of Rs. 9,400 odd he had taken from the said Kanhaiya Lal a mortgage or security bond on the 15th of November, 1924, which bond hypothecated a decree which Kanhaiya Lal had obtained in suit No. 251 of 1923, and he sought by his application, after due notice issued to the parties concerned, "to be brought upon the array of decree-holders", to use his exact language, and to enforce against the judgment-debtor the right which he, the applicant, had under his mortgage through Kanhaiya Lal, the decree-holder. The learned Judge rejected this application on the ground that order XXI, rule 16, did not apply. That question has resulted in a very interesting discussion of law before us. The respondent, in support of the order of the court below, referred us to various other matters which according to his view affected the application in such a way as to show that it ought to fail. These matters are not clearly before us on the record. The learned Judge might have dealt with the matter upon the merits. He did not, however, do that. He denied the right of the applicant to be heard on the merits. On that point we disagree with him and therefore the case must go back.

In arriving at a decision rejecting the application the learned judge based himself upon a reported decision of this High Court, namely, *Mazhar Husain v. Musammat Amtul Bibi* (1). The case is a recent one, having been decided in 1922. As a matter of fact, according to the provisions of section 3 of the Indian Law Reports Act of 1875, the learned judge was not bound to look at the report at all. It is a pity that the

(1) (1922) 66 Indian Cases, 679.

courts below do not pay more attention to this provision, which is in a large measure a dead letter. This case illustrates the danger of accepting cases so reported. Unfortunately there is a great deal of inferior reporting in India. Some of the private reports do not receive any editing at all, or little editing worthy of the name, and the legal implications arising from the cases which they report are not considered. In the particular case by which the learned Judge was guided, the judgement of the High Court takes the trouble to say that the facts of the case are clearly stated in the order of the court below. In spite of this hint to those who might desire in future to consult the judgement, the report contains no reference or quotation, either from the order of the court below, or from the judgement to which the High Court referred. We do not doubt that a decision of this Court, unreported, may be cited to a lower court if the record is in the lower court, to enable the lower court to advise itself by what had been done in a previous unrecorded case by the High Court, but that is not the same thing as the production of an emasculated report. We find, on looking at the original record of the case reported in the Indian Cases that, as a matter of fact, the applicant in that case was the holder of a decree which he had obtained upon his assignment of mortgage, and that therefore the original assignment under which he claimed to apply under order XXI, rule 16, had become merged in a decree. There is nothing in the judgement of the High Court to show that that particular aspect of the matter influenced their judgement. On the other hand, there is nothing to show that it did not. A study of this case by the Judge in the court below, which of course he had no opportunity of making,

1926

RAM
SAHAI
v.
MADAN
LAL
KANHAIYA
LAL.

Walsh, J.

1926
RAM
SAHAJ
v.
MADAN
LAL
KANHAIYA
LAL.

Walsh, J.

would have shown that it dealt with a different set of circumstances from the case with which he was dealing and that it did not apply. The result is that he has either denied himself jurisdiction in rejecting the application by following an authority which had no application, or he has irregularly exercised his jurisdiction so as to defeat the claim, if there is one, of the applicant, by applying a decided case which had no application. It would be a great misfortune if the High Court, in a simple matter of a miscarriage of recognized legal procedure, should be unable to interfere, and we are agreed that, whichever branch of section 115 is looked at, the section applies to this case.

The decision in *Mazhar Husain v. Musammatt Amtul Bibi* (1), to which I have referred, undoubtedly, contains dicta which go far beyond the particular matter disposed of, and which raise very serious questions of practice under this rule, and, although I recognize that what I am going to say is mere obiter, nonetheless it seems to me difficult to regard this case as an authority, mainly for the reasons that, firstly, the case was clearly not argued very seriously before this High Court, secondly, because there are expressions in the rule to which I will refer in a moment which seem to me to raise serious doubts as to the correctness of the dicta, and, thirdly, because the decision is contrary to the current of decisions in the Calcutta High Court and in the Madras High Court, which are the only High Courts, so far as we know, in which this matter has been considered, except that the CHIEF JUSTICE of the Punjab in another case has cited these authorities without expressing any doubt as to their soundness, and these cases were not cited before the Allahabad High Court.

(1) (1922) 66 Indian Cases, 679.

Order XXI, rule 16, provides as follows :—

“ Where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder ”.

1926

RAM
SAHAI
v.
MADAN
LAL
KANHAIYA
LAL.

I have intentionally omitted the alternative which occurs at the commencement of this rule. An argument was addressed to us that what was meant by the rule was the whole interest of the decree-holder, and the words “ the interest of any decree-holder ” were relied upon. Those words have no application to the case before us. The phrase in which the term “ the interest of any decree-holder ” occurs is an alternative to a decree. The rule therefore running “ where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder ” clearly shows that the rule contemplates, at any rate in the case of a joint decree, the transfer, by assignment or by operation of law, of the interest of any of the joint decree-holders, not covering therefore the whole interest in the decision.

Walsh, J.

Regarded independently of any authority, it seems to me that this provision is quite clear and the first duty of a court is to interpret the words as it finds them, unless, in a case of doubt or difficulty, it desires to seek guidance from previous interpretations. I am unable to understand how it can be suggested that the transfer by a mortgage or hypothecation bond of a decree is not a transfer by assignment in writing. I can find nothing in the general law prohibiting me from putting that interpretation upon the language and nothing in the Code

1926

RAM
SAHAI
v.
MADAN
LAL
KANHAIYA
LAL.

inconsistent with the right of a mortgagee of a decree to apply under this rule.

With regard to the argument based upon the contention that the rule applies only to the whole of an interest in a decree and not to a fractional part, I can only say that if that were the true view, it seems to me impossible to give effect to the words "operation of law". The transfer contemplated is not merely by an assignment in writing, but by operation of law also. These words are invariably used with reference to insolvency, or death, when by operation of law the whole or the part interest in a decree vests in the official receiver in insolvency, or in a legal representative by reason of death. If the contrary view were held the result would be, for example, that if a Muhammadan died intestate, leaving a widow and children, all of whom by operation of law became entitled to a fractional interest in any decrees which he held, and it might happen that the only estate he had consisted of unenforced decrees, they would be unable to enforce their rights against the judgment-debtors, under this rule. I cannot believe that such a result was intended. I asked the learned advocate supporting this order: "Assuming that a mortgagee or a transferee, either by assignment or by operation of law, had a right to have his application considered by the court, under what rule could he apply if it was not under this order XXI, rule 16?" and to that question I received no answer and I am satisfied that no answer can be given.

I, therefore, take the view that it is wrong to say that this rule does not apply to an assignment by mortgage or to any transfer which has the effect of conferring upon the transferee or assignee a merely fractional interest in a decree and I am confirmed in this view by the fact, as I have already stated, that

in Calcutta and Madras this question has been settled for nearly thirty years. I refer to *Kishore Chand Bhakat v. Gisborne & Co.* (1) and *Endoori Venkata-ramaniah v. Venkatachainulu* (2). These cases, I think, rightly draw attention to the fact that there is no prohibition in the Code to which reference can be made making such an application as this, one which has no legal foundation, and in both cases the Judges were careful to point out that it was for the execution court below to consider, with all the parties before it, the respective rights of each. These are the two cases to which the CHIEF JUSTICE of the Punjab referred in *Mohkam Chan v. Ganga Ram* (3) without suggesting, although he was deciding against the applicant, that there was any doubt as to the soundness of the decisions.

The case that has troubled us is the decision of a Full Bench in *Yad Ram v. Sundar Singh* (4) to which I happen to have been a party, although I dissented from the decision because I was satisfied that the law had been wrongly applied and that there had been a miscarriage of justice, but I desire faithfully to follow that decision which took the view that where on the subject-matter there is a current of authorities one way in other High Courts and a current of authorities the other way in the High Court to which he is subordinate, a Subordinate Judge cannot be said to have gone outside his jurisdiction, or to have exercised it irregularly, in following the decisions of his own High Court, by which he is undoubtedly bound when they are in *pari materia*. Mr. Justice PIGGOTT and myself pointed out that if the Subordinate Judge had a doubt about the decision of his own High Court, having regard to other decisions, or other views by which he was equally impressed, he might

1926

RAM
SAHAI
v.
MADAN
LAL
KANHAIYA
LAL.

Walsh, J.

(1) (1889) I.L.R., 17 Cal., 341.
(3) (1915) 39 Indian Cases, 654.

(2) (1909) I.L.R., 33 Mad., 50.
(4) (1923) I.L.R., 45 All., 425

1926

RAM
SAHAI
v.
MADAN
LAL
KANHAIYA
LAL.

resort to a well-known provision of the Code, order XLVI, rule 1, and refer the matter to the decision of the High Court. When so referred, it is open to this High Court, if it considers that the decision otherwise binding upon the subordinate courts requires reconsideration, to refer the matter to a Full Bench, and I pointed out in my judgement that a Subordinate Judge need not be too timorous about stating it if he really entertains doubt, and states it for the purpose of having it removed, not merely for the case in question but for the benefit of litigants in general and the guidance of the lower courts.

The case before us is not on all fours with that Full Bench decision. We think this is clearly a case in which it is our duty to remit it to the lower court to be dealt with on the merits. I have already pointed out that what I have said with regard to the interpretation of order XXI, rule 16, is merely obiter. If the learned Judge should ultimately be of opinion that the applicant has a right upon the merits and he is prepared to enforce such right by an order, he should pass such order, but if he should still entertain doubts, having regard to the dicta to which we have referred in the report in Indian Cases and to the foregoing expression of opinion about the real interpretation of this rule, he should exercise the powers conferred upon him by the Code under order XLVI, rule 1; but we would implore him, before he takes any step of that kind, to deal with the position, the facts, and the merits and to come to a final decision upon the merits as though the matter were properly before him, and if he does this, whatever the view of law taken in any subsequent proceedings may be, the court ultimately disposing of the matter will not be embarrassed, as we have been, from coming to a final decision.

DALAL, J.—I agree with the order of remand passed by my learned brother and shall state my

reasons. The revisional jurisdiction of this Court has been confined within narrow limits by various Divisional Bench and Full Bench decisions and whatever one's private opinion may be, those decisions have to be followed for the sake of consistency.

In the present case I shall only deal with the question whether a revision lies in the present case or not. The mortgagee of a decree applied for execution under order XXI, rule 16, and the lower court held that the applicant was not such an assignee as is contemplated under the terms of that rule and dismissed the application. If this opinion had been reached by the learned Subordinate Judge on reasons of his own, I would have held that no revision application lay to this Court. The applicant's learned counsel, Dr. *Katju*, argued that the lower court had failed to exercise a jurisdiction vested in it because it had dismissed the application of the mortgagee and so revision would lie under section 115 (b) of the Civil Procedure Code. In my opinion such an argument is untenable. Jurisdiction, in that case, would depend only on the result; if an application is granted, it may be argued that the lower court exercised the jurisdiction not vested in it and if it is refused, it may be argued that it failed to exercise a jurisdiction which was vested in it. In both cases, in my opinion, the court would have exercised jurisdiction and there would be neither illegality nor material irregularity even if the court went wrong in applying any particular provision of law to the matter before it.

In the present case, however, the lower court did not exercise its own judgement but felt itself bound by a ruling of this Court. If the ruling had been applicable I would have held that the present application could not be entertained by this Court. A

1925

RAM
SAHAI
F.
MADAN
LAL
KANEHAIYA
LAL.

Dalal, J.

1926

RAM
SAHAI
v.
MADAN
LAL
RANEHAIYA
LAL.

Dalal, J.

subordinate court is bound to follow a decision of a Bench of this Court, see *Puttu Lal v. Parbati Kunwar* (1), and in doing so it would be exercising jurisdiction rightly and not irregularly—*per* PIGGOTT, J., in *Yad Ram v. Sunder Singh* (2). The case quoted by the lower court is that of *Mazhar Husain v. Musammat Amtul Bibi* (3). The facts of that case were entirely different. The question there was whether a decree-holder who had obtained a decree for sale of another decree could be considered an assignee from the decree-holder of the second decree. The appellant in that case had obtained a decree for the sale of a decree mortgaged to him, and, instead of putting the second decree to sale, he applied to be substituted in place of the decree-holder. His proper remedy was to put the decree in favour of the judgement-debtor to sale, and only in the case of his purchasing that decree he would become an assignee of that decree. The mortgage in his favour had merged in the decree and he was no longer the mortgagee of the decree. The learned Judges held that up to the date of the delivery of that judgement the decree had not been transferred to anybody by assignment in writing. That was correct, because the decree had not been put up for sale in execution of the decree in favour of the appellant. Then occurs a cryptic sentence: "There is considerable distinction between the transfer of rights as a decree-holder by mortgage and a transfer by assignment in writing or by operation of law of the decree itself". This sentence has no relation whatsoever with the facts of the case before the learned Judges and I am of opinion that there has been a slip in dictating the judgement and the word "by" is really a slip for "under" or "on foot of". The learned Judges in my opinion desired to draw a

(1) (1915) I.L.R., 37 All., 359

(2) (1923) I.L.R., 45 All., 425.

(3) (1922) 66 Indian Cases, 679.

distinction between the rights of a decree-holder on foot of or under a mortgage and the rights of a transferee by assignment in writing. Such a distinction does obviously exist, but that distinction is not one in favour of holding that a mortgagee of a decree is not an assignee thereof under order XXI, rule 16.

The lower court wrongly considered itself bound by a Bench ruling of this Court, which has no reference to the facts of the case before it, and in doing so failed to exercise its own judgement and by such failure failed to exercise a jurisdiction vested in it. This is the ground on which I agree in the order proposed.

By THE COURT.—The order of the Court is that the case be remitted to the lower court to dispose of the application upon the merits. Costs of this Court as well as of the court below will abide the result.

PRIVY COUNCIL.

RAM CHARAN LONIA AND OTHERS (DEFENDANTS) v. BHAGWAN DAS MAHESHWRI, (SINCE DECEASED), AND OTHERS (PLAINTIFFS).*

1926
J.C.*
April, 15.

[On appeal from the High Court at Allahabad.]

Hindu law—Joint family property—Alienation by karta—Improvident contract of sale—Invalidity of contract—Purchaser discharging mortgage debt—Purchaser in possession under decree—Terms of re-possession by family.

In 1912 the karta of a joint Hindu family contracted to sell substantially the whole immovable property of the family. The discharge of a debt under a simple mortgage of 1909 at compound interest, which was binding on the property, was urgently necessary; the price fixed made the sale a prudent one if payment was made forthwith. Owing, however, to a contract previously made for a sale of part of the property, the purchasers were in a position under the contract to defer

* Present :—Viscount DUNEDIN, Lord BLANESBURGH, Sir JOHN EDGE and Mr. AMEER ALI.

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESHWARI.

completion and payment indefinitely, and the contract was thus of no value to relieve the financial necessity existing at its date. Under a decree for specific performance in a suit brought by the purchasers, the karta's sons not being parties, the purchasers obtained in 1917 a conveyance, and in 1918 possession. Out of the price they discharged the debt under the mortgage of 1909. The karta's sons sued to set aside the sale and for recovery of the property.

Held that the contract was improvident and beyond the powers of the karta, and should be set aside; but, in the circumstances, upon terms. The purchasers should have the full benefit of the mortgage of 1909; and their possession, having been taken under an order of the court, should be taken as that of usufructuary mortgagees; with the result that during their possession they should be entitled to no interest but not accountable for profits; and that on payment within a year of a certificate as to the amount due on the above basis there should be a reconveyance.

Judgement of the High Court varied.

APPEAL (No. 177 of 1924) from a decree of the High Court (January 31, 1922) reversing a decree of the Additional Subordinate Judge of Jaunpur.

The suit was brought by respondents 1 to 5, the sons of Gopal Das, the karta of a Hindu joint family, to set aside a sale of ancestral zamindari property by a contract dated the 3rd of September, 1912, to defendants now represented by the respondents, and for possession with mesne profits. In 1915 the purchasers had brought a suit for specific performance against Gopal Das and had obtained a decree therein, and a sale-deed dated the 1st of November, 1917, executed by the court. Out of the purchase price of Rs. 22,508 they set aside Rs. 21,818 for the discharge of the debt due upon a simple mortgage for Rs. 10,500 made in 1909 at $8\frac{1}{4}$ per cent. compound interest, secured upon the property. The defendants had obtained possession on the 14th of January, 1918, and had been in possession since.

The facts appear from the judgement of the Judicial Committee.

The trial Judge dismissed the suit, holding that the sale was for necessity. The High Court reversed the decree. The learned Judges (Piggott and WALSH, JJ.), while of opinion that there was necessity to discharge the mortgage, held that the compound interest was beyond what was necessary or binding upon the sons. By their decree they set aside the transaction save so far as the plaintiffs were to be liable to the defendants for Rs. 10,500 with simple interest at $8\frac{1}{4}$ per cent. and ordered that the defendants should account for the profits of the property since the 14th of January, 1918; and that the plaintiffs should recover possession upon the sum declared to be due being satisfied, either out of the usufruct of the property or by deposit in court of the balance due after deducting the profits to date.

1926. Feb. 12, 15. *DeGruyther K. C.*, *Dube* and *Fatehsingh* for the appellants.

T. B. Ramsay for the respondents.

April, 15. The judgement of their Lordships was delivered by Lord BLANESBURGH :—

The broad issue in this suit is whether a sale of ancestral zamindari property agreed to be made to the appellant, Ram Charan Lonia, and another, now deceased, by the nominal respondent Gopal Das, the head of a joint Hindu family to which the property belonged, is binding upon the major and minor sons of Gopal Das. If it is, no further difficulty arises. If it is not, then the order proper now to be made may in the somewhat unusual circumstances of the case raise a supplemental question of nicety.

Gopal Das is a vaishya or trader by caste. His family at the institution of the suit consisted of seven

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESHWRI.

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESHWRI.

sons : one is now dead. Four of the sons were, on the 3rd of September, 1912, the date of the impeached agreement, adult. The other three were then and at the commencement of the suit were still, infants. The joint family property included a business at Benares for the sale, at first of grain, and later of cloth. From before 1912 the four adult sons had been helping their father in the conduct of that business and in the management of the zamindari. But Gopal Das himself remained throughout the karta of the joint family.

The property in suit consists of three villages in the district of Jaunpur. It represents substantially the entire immovable heritage of the family. It became part of their possessions when in 1896 it was taken over by Gopal Das in satisfaction of a debt of Rs.15,000 then owing on business transactions by another firm of traders. No reliable valuation of the property at the different relevant dates is to be found in the evidence. It is estimated, however, by the appellants in their written statement to have been, at the date of the agreement in suit, of the value of between Rs. 21,000 and Rs. 22,000. By the sons it is alleged to have been worth then, and to be worth now, a great deal more. For the purposes of this judgment their Lordships, while by no means convinced of its correctness, will accept the appellants' estimate of its value at the contract date. It improved in value immediately afterwards.

The family business was not apparently successful, and the position became embarrassing. In 1909 money had necessarily to be raised and, in circumstances which admittedly called for the advance—although whether on the terms on which it was obtained is another matter—the property was, on the

1926

RAM
CHABAN
LONIA
r.
BHAGWAN
DAS
MAHESHW.

10th of July, 1909, mortgaged to one Manik Chand to secure a sum of Rs. 10,500. This mortgage was executed by the four adult sons of Gopal Das and by himself, both on his own account and as guardian of his three infant sons. Compound interest at $8\frac{1}{4}$ per cent. per annum with half-yearly rests was reserved by the mortgage, and there was a penalty clause under which the interest could be increased to 9 per cent. per annum similarly compoundable. This, possibly somewhat high, rate, even apart from the penalty added, has attracted the notice of the High Court of Allahabad in the judgement under appeal, and to that aspect of the transaction their Lordships will again advert. For the moment they allude to it only to draw attention to the critical position of the family's free interest in the property, should there be any persistent neglect on their part to keep down the interest as it accrued under the deed.

Between the date of the mortgage and July, 1912, practically no interest was paid—not more than Rs. 800, possibly not so much. In consequence, by that date the amount due in respect of principal and capitalized interest in arrear amounted to nearly Rs. 14,000. Manik Chand had not so far begun to press for payment either of principal or interest, but the amount charged upon the property was automatically increasing at a great rate. No funds were available to stay the no longer remote possibility of all value in the equity of redemption being extinguished; money also was needed for payment of other trade debts that had accrued, as well as for the development of the family cloth business then recently initiated. In these circumstances, a transaction even involving the disposal by Gopal Das of this entire immovable family property might well be justifiable and be binding on the whole family, provided the property

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESHWRI.

was not sacrificed for an inadequate price and provided the consideration was calculated to relieve the necessity, the existence of which called for the disposition. In the present case, for instance, a very short limit of time within which the purchasers must complete or lose their contract was plainly of the essence of any transaction of sale called for by the circumstances as they then existed.

The first transaction in relation to this property which in 1912 was entered into by Gopal Das was a contract of the 16th of July, whereby he agreed to sell to one Musammam Muhammad-un-nissa 16 annas of one of the three mortgaged villages—Duhawar by name. The price was the sum of money which, invested at $4\frac{1}{8}$ per cent., would produce the then net annual rental of the property. The sale was to be completed in a month, and Rs. 502 were paid to Gopal Das by way of deposit. This contract remained operative until July, 1915 three years later—when, but not till then, as a result of Gopal Das's default, it was brought to an end by an order made at the instance of the purchaser for return of her deposit and interest.

The second transaction was the contract in suit. Under it Gopal Das, in effect, agreed to sell to the purchasers, now represented by the appellants, the entire mortgaged property at a price corresponding to the sum which, invested at $4\frac{1}{2}$ per cent. per annum, would produce an amount equal to the then net rentals of the property. The purchasers were to retain so much of the purchase price as was necessary to enable them to discharge all sums owing on the mortgage of the 10th of July, 1909, and were to account to the vendor for the balance of the purchase price. The sale deed was to be executed in 30 days, and a currency

note of Rs. 500 was paid to Gopal Das as earnest money. Such in its stated effect is the contract which six of the seven sons of Gopal Das sought in this suit to set aside.

1926

RAM
CHARAN
LONIA

v.

BHAGWAN
DAS
MAHESHWRI.

On their face these terms seem prudent enough. The price, found by subsequent calculation to be Rs. 22,508-10-10, not only represented an adequate number of years' purchase of the then rental, but under the terms of the contract was payable in 30 days. If so paid, after discharging in full the amount at that date due on the mortgage of 1909, a substantial sum would have remained to meet the other family necessities, thus justifying the propriety of the disposition.

But the terms of the contract as so stated do not describe its real result. They take no account of the influence upon the transaction of Muhammad-un-nissa's earlier contract, the existence of which was well known to the purchasers before they entered into their own agreement to purchase. From this it followed, as will appear in the sequel, that, so long as that earlier contract remained in being, the purchasers were under no enforceable obligation to perform their own. Nor were they liable to be visited with the usual consequences of such laches if, during the same period, they omitted to take any steps to enforce its performance by the vendor. The real question in the suit, therefore, as their Lordships see it, is whether a contract of sale involving such potentialities, all in the event realized, can be held binding on the plaintiffs.

Gopal Das apparently soon repented of both contracts and would perform neither. The first purchaser, after, as has been seen, standing by her contract for nearly three years, at length sued for and

1926
RAM
CHARAN
LONIA
v.
BRAHMAN
DAS
MAHESHWRI.

recovered her deposit. Immediately afterwards, namely, on the 31st of August, 1915, the purchasers under the contract in suit commenced against Gopal Das alone an action for its specific performance. That suit was resisted by Gopal Das, and, amongst other defences, he contended that it was at that date barred by laches. But the plea was repelled by the Subordinate Judge on the ground, as already indicated, that so long as Musammatt Muhammad-un-nissa's contract remained subsisting the plaintiffs to that suit "did not dare enforcement of their contract. But the removal of that obstacle cleared their way to court. In other words, the plaintiffs are not guilty of any laches." And this was on appeal the view of the High Court also.

In the result, specific performance of the contract against Gopal Das was decreed by the Subordinate Judge of Jaunpur on the 10th of February, 1917, and his decree was affirmed by the High Court at Allahabad by decree of the 6th of March, 1919. Pending the appeal, namely, on the 12th of May, 1917, an order for possession of the property was made by the Subordinate Judge, and on the 1st of November, 1917, under order of the court, a formal sale deed of the property was executed by the Judge in the name and on behalf of Gopal Das in favour of the purchasers, and since that date or shortly afterwards they have been in actual possession of the property and in receipt of the rents and profits. It is stated in the sale deed that the amount due on the mortgage of the 10th of July, 1909, was, on the 1st of November, 1917, Rs. 21,818-14, and that after setting aside that sum out of the purchase price of Rs. 22,508-10-10, and deducting also therefrom the Rs. 500 paid to Gopal Das as earnest money, the sum of Rs. 189-12-10 alone

remained for payment to him. The purchasers, however, did not then pay off the mortgage of the 10th of July, 1909. They made no payment at all on this account until the 4th of September, 1919, when they deposited in court a sum ultimately increased to Rs. 23,200, sufficient to satisfy the debt. Manik Chand, as appears in the judgement of the High Court, has now been paid off by the appellants.

In the specific performance suit a direction was given on the 17th of July, 1916, by the Subordinate Judge that, as the property in question was family property, the sons of Gopal Das should be added as defendants. The plaintiffs, however, elected to continue their proceedings against Gopal Das alone. In consequence the High Court, while affirming the decree for specific performance against him as above mentioned, refused to express any opinion as to its value in the circumstances. In their judgement it had none, so far as the present plaintiffs are concerned.

On the 7th of September, 1916, this suit was instituted. The plaintiffs were all the sons of Gopal Das, with the exception of one son, Debi Das, who, along with Gopal Das, was made a *pro forma* defendant. The defendant Sital Das, one of the purchasers, died during the pendency of the suit, and eleven of the appellants were substituted as his representatives. The plaintiffs, alleging that the property in suit of the value of Rs. 40,000 was joint family property, asked for a decree that the agreement to sell it to the defendants, the purchasers, was invalid. It is to be noted at this point that no suggestion was made in their plaint by the plaintiffs that the mortgage of the 10th of July, 1909, was in any way open to objection or not binding upon them.

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESHWRI.

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESHWRI.

On the 29th of March, 1919, the Additional Subordinate Judge of Jaunpur dismissed the suit with costs. He held that necessity existed and that the contract to sell was binding on the plaintiffs upon the obligations of the purchasers under the contract in suit. He in no way, however, adverted in his judgement to the influence of the earlier contract of the 16th of July, 1912. In supporting that contract as he did, he treated it as effective and enforceable according to its tenor.

The plaintiffs appealed to the High Court at Allahabad, and that Court, on the 31st of January, 1922, allowed the appeal, decreed the suit, and set aside the decree of the court below. The learned Judges there were not influenced to their conclusion, any more than the learned Subordinate Judge had been, by the effect of the contract with Muhammad-un-nissa upon the obligations of the purchasers under the contract in suit. They agreed, too, with the learned Subordinate Judge in the view that the family circumstances called for definite action in July, 1912, but as a sum of Rs. 14,000 would then have sufficed to pay off Manik Chand, there was, in their judgement, no necessity for Gopal Das to part with property of himself and his sons for Rs. 22,000. Moreover, and this was the principal ground of their judgement, they held that while as to the principal sum of Rs. 10,500 secured by the mortgage to Manik Chand there was legal necessity sufficient to make that transaction binding, not only upon Gopal Das and his major sons, but also upon his minor sons, there was no legal necessity to submit to so high a rate of interest as the rate reserved. In their judgement the sum chargeable against the family property under that mortgage should be limited to Rs. 10,500, with simple

interest at the rate of $8\frac{1}{4}$ per cent. per annum from the date of the mortgage, the 10th of July, 1909, to the date of the sale deed, the 1st of November, 1917, but no longer. Their decree, therefore, in effect, was that the plaintiffs were not bound by the agreement in suit nor by the sale deed of the 1st of November, 1917: that the property must be reconveyed on payment to the present appellants of Rs. 10,500, with interest at the rate aforesaid to the 1st of November, 1917, only; and that the appellants were to account to the present respondents for the profits of the property from the date of their taking possession thereof until reconveyance. From that order the purchasers appeal.

Their Lordships are of opinion that the contract in suit is not binding upon the sons of Gopal Das, so that they are in agreement with the High Court in its main conclusion, and see no reason for restoring the judgement of the learned Subordinate Judge. They are, however, unable to reach that conclusion on the same grounds as the High Court. They think also that in matters of detail the order of that Court requires amendment. They do not, for instance, see why, if the appellants are made accountable for the rents of the property during their period of possession, they should be deprived of any interest on the mortgage during the same period: why they should be placed in a worse position than Manik Chand would have occupied, in whose shoes in this respect they stand.

But their Lordships go further. The mortgage of the 10th of July, 1909, was in no way impeached or questioned in the suit by the plaintiffs, and its terms in the view of the Board are not such as to justify a court in judicially affirming, without evidence to that

1926

RAM
CHABAN
LONIA
v.
BHAGWAN
DAS
MAHESHWRI.

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESWARI.

effect, that in substance they are either excessive or unconscionable. In these proceedings accordingly a court must, their Lordships think, act upon the view that at the date of the contract in suit the mortgage of the 10th of July, 1909, was valid, and that the question whether the contract was binding upon the family must be determined on that footing.

Dealing with the case on that basis, their Lordships are of opinion that that contract was not so binding, for a reason which they have already indicated. In truth the contract was of the most improvident description. Immediate payment of the purchase price being the prime necessity, the contract bound the vendor to sell at a fixed price property of apparently increasing value in circumstances which gave the purchasers the privilege of indefinitely postponing completion of the purchase and payment of the price, with the further privilege, if it so suited them, of repudiating the bargain altogether on the ground that so long as the earlier contract was insisted upon by its purchaser, the vendor could make no title. In other words, the existence of this earlier contract in the event showed that the contract in suit was deprived of all value as a solvent of the family's financial difficulties at its date, and was converted into an arrangement not materially more beneficial than one by which Gopal Das, at the end of three years, became bound to hand over to the mortgagees for in effect nothing the entire equity of redemption in the mortgaged property. In their Lordships' judgement such a transaction was entirely beyond the power of Gopal Das as karta of the joint family, and is not binding on the plaintiffs. To this extent, therefore, although on these grounds only, the order of the High Court should, their Lordships think, be affirmed.

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESHWARI

The consequential directions proper to be made are, however, not so clear. The position is much complicated by the fact that the appellants have without real title been in possession and receipt of the profits of the property for many years. Their claims as, in effect, transferees of Manik Chand's mortgage have also to be borne in mind.

In strictness, possibly, their obligations as purchasers under an invalid contract should be alone dealt with in this suit, and their rights as mortgagees, whatever they are, be reserved for determination in another proceeding. But their Lordships agree entirely with WALSH, J., when, in his judgement in the High Court, he expressed the view that this was pre-eminently a case in which the Court being seised of the whole matter, should make such an order as may terminate the controversy and do justice between the parties.

Accordingly, while their Lordships are of opinion that the contract of the 3rd of September, 1912, was not binding upon the plaintiffs, they think that in the circumstances it should now be set aside only upon terms. One of these terms must, they think, be that the appellants have the full benefit of the mortgage of the 10th of July, 1909, as a mortgage carrying compound interest at the rate of $8\frac{1}{4}$ per cent. per annum, and that their possession of the property, although unwarranted as purchasers, should not—it having been taken under an order of the court—be treated as that of a mortgagee in possession with all the burdens of such a possession. It is just, as their Lordships think, that the mortgage should for this purpose be treated as a usufructuary mortgage—and the possession of the appellants be treated as possession thereunder—with the result that during that possession

1926

RAM
CHARAN
LONIA
v.
BHAGWAN
DAS
MAHESHWRI.

they will be entitled to no interest, but, on the other hand, will not be accountable for profits. It will be just also that the plaintiffs should have their costs in both Courts in India, if, ultimately, they redeem the property as below stated, but not otherwise.

With these views in mind their Lordships think that the proper order now to be made is the following :—

Vary the order of the High Court by directing that an account be taken of the amount due on the 1st of November, 1917, in respect of the mortgage of the 10th of July, 1909, as a mortgage carrying compound interest at the rate of $8\frac{1}{4}$ per cent. per annum. Let that mortgage stand between the appellants and respondents as security for the sum so found less the costs of the plaintiffs in both courts in India. All interest to cease as from the 1st of November, 1917, but the appellants not be accountable for rents and profits of the property during their period of possession. On payment by the respondents within one year from the date of certificate of the sum so certified less the costs aforesaid, let the appellants reconvey the property comprised in the deed of sale of the 1st of November, 1917, freed and discharged from all claims and demands in respect of the mortgage of the 10th of July, 1909. In default of such payment on or before the date aforesaid, let this suit as from that date stand dismissed without costs.

Each of the parties should, in any event, bear their costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *T. L. Wilson & Co.*,

Solicitors for respondents : *Barrow, Rogers, and Nevill.*

PANCHAM AND OTHERS (PLAINTIFFS) *v.* ANSAR HUSAIN
AND OTHERS (DEFENDANTS).*

[On Appeal from the High Court at Allahabad.]

Mortgage—Limitation—Date of cause of action—Date for repayment—Provision for earlier payments—Enforceability upon default—Plaintiff bound by plaint—Indian Limitation Act (IX of 1908) schedule I, article 132.

1926
J.C.*
May, 17.

By a mortgage bond for Rs. 4,000 and interest executed on the 21st of February, 1893, repayment was to be made at the expiry of twelve years, but the mortgagors agreed to pay Rs. 500 annually in respect of principal and interest: upon default in making these payments the mortgage was to be enforceable by sale even if the time for repayment had not arrived. No annual payments were made. On the 21st of February, 1917, the mortgagee sued for a sale decree, stating that his cause of action accrued on the 21st of February, 1905 (the date fixed for repayment). Upon the court rejecting that plaint under order VII rule 11(d), he filed an amended plaint stating that his cause of action accrued on the 21st of February, 1894, (the date of the first default), also on later dates, including the 10th of April, 1906, on which dates he alleged that interest had been paid. At the trial he failed to prove that any interest had been paid.

Held that the amended plaint precluded the mortgagee from contending that his cause of action accrued on the 21st of February, 1905, and not on the 21st of February, 1894, and consequently that the suit was barred by the Indian Limitation Act, 1908, schedule I, article 132. *Gaya Din v. Jhumman Lal* (1), and *Shib Dayal v. Meharban* (2), discussed; having regard to the facts of the present case it was not necessary to decide whether those cases, or decisions of other High Courts to a contrary effect, were correctly decided.

Judgement of the High Court, I. L. R., 43 All., 596, affirmed.

APPEAL (No. 84 of 1924) from a decree of the High Court (April 12, 1921) affirming a decree of the Subordinate Judge of Allahabad (May 31, 1918).

* *Present* :—Lord BLANESBURGH, Lord DARLING, and Sir JOHN EDGE.

(1) (1915) I.L.R., 37 All., 400.

(2) (1922) I.L.R., 45 All., 27.

1926

PANCHAM
v.
ANSAR
HUSAIN.

The suit was brought by the appellants on the 21st of February, 1917, to recover Rs. 34,000 under a mortgage bond dated the 21st of February, 1893, by sale of the mortgaged property.

The sole question upon the appeal was whether the suit was barred by article 132 of schedule I of the Indian Limitation Act, by which the period of limitation for a suit "to enforce payment of money charged upon immovable property" is twelve years from "the time when the money sued for becomes payable."

THE facts appear from the judgement of the Judicial Committee.

The Subordinate Judge held that the suit was barred, and his judgement was affirmed by the High Court in a judgement which is reported at I. L. R., 43 All., 596. The learned Judges (TUDBALL and SULAIMAN, JJ.) followed *Gaya Din v. Jhumman Lal* (1).

1926. March 25, 26; May 1. *Abdul Majid* for the appellant: The present cause of action did not arise until the 21st of February, 1905. The bond definitely fixed that date for repayment. The provision in the deed as to enforcement on default at an earlier date was inoperative. It was inconsistent with the term fixing the date, and that term being the earlier in the deed prevails. Even if that provision was not inoperative *ab initio*, it merely gave an option to the mortgagee, and as he did not proceed under it, it became inoperative. The mortgagee could waive his right to enforce upon a default: *Maharaja of Benares v. Nand Ram* (2), *Bir Narain Panda v. Darpa Narain Prodhon* (3). Upon the

(1) (1915) I.L.R., 37 All., 400.

(2) (1907) I.L.R., 29 All., 431.

(3) (1892) I.L.R., 20 Cal., 74.

true construction of the deed the decisions in *Gaya Din v. Jhumman Lal* (1) and *Shib Dayal v. Meharban* (2) do not apply. If they do, they were wrongly decided for the reasons given by BANERJI, J., in his dissenting judgement in the first of these cases. The decisions of the Madras High Court in *Nettakaruppa Goundan v. Kumarasami Goundan* (3), and *Narna v. Ammani Amma* (4), which are in conflict with the Allahabad decisions, were rightly decided. The plaintiff did not abandon his contention that the cause of action did not arise until 1905, on the contrary that contention was pressed in both courts. It was not contended in the lower courts that the amendment of the plaint precluded the contention, and the Board does not readily give effect to a new contention upon appeal. Further, the amendment was not the voluntary act of the plaintiff; it was made under compulsion of the court, which acted under a mistaken view of the law.

1926

PANCHAM

v.

ANSAR
HUSAIN.

The respondents did not appear.

May, 17. The judgement of their Lordships was delivered by Lord BLANESBURGH :—

This is a suit to enforce, by the sale of property taken as security, payment of the sum said to be due upon a mortgage. The only question which now remains for decision is whether the appellants' right to maintain the suit is barred by limitation. The Subordinate Judge of Allahabad, on grounds to which their Lordships will return, by his judgement of the 31st of May, 1918, held that the right was barred: the High Court at Allahabad in its judgement on appeal on the 12th of April, 1921, reached the same conclusion, but on other grounds. The plaintiffs, the mortgagees, appeal.

(1) (1915) I.L.R., 37 All., 400.

(2) (1922) I.L.R., 45 All., 27.

(3) (1898) I.L.R., 22 Mad., 20.

(4) (1916) I.L.R., 39 Mad., 951.

1926

PANCHAM
v.
ANSAR
HUSAIN.

The defendants, successors of the original mortgagors, were not represented by counsel before their Lordships.

Although the issue now is one of limitation only, a short statement of the position as a whole will not be out of place.

The mortgage deed in suit is dated the 21st of February, 1893. It purports to have been granted by one Saiyid Zawar Husain and his mother, Musammat Sadar-un-nisa Bibi. She was a pardanashin lady. The deed is not executed by her, but by her son on her behalf. Both are long since dead. The son died in 1911, the mother in 1914. As a result all the facts in relation to the original transaction will probably now never be ascertained with accuracy. For this the appellants must be held responsible. Proceedings in relation to the mortgage were delayed by them until long after the death of the principal actors in the transaction. Nor has any explanation of their prolonged inaction been offered.

The mortgage bond is expressed to be for Rs. 4,000. The loan carries interest at a rate equivalent to 10 per cent. per annum. The time fixed for repayment is 12 years, but the mortgagors covenant to make an annual payment of Rs. 500 on account of principal and interest, while the bond further provides that unpaid interest shall be treated as principal and shall carry interest at the same rate. The property mortgaged is of two classes, pure zamindari in certain mauzas in the Allahabad District now in possession of the respondents, and 13 items of property held in mortgage from other persons and sub-mortgaged by the mortgage in suit.

In the long interval these secured debts so sub-mortgaged have disappeared. The only property now

effectively included in the appellants' mortgage is the immovable estate above referred to.

1926

PANCHAM

v.

ANSAR
HUSAIN.

Their suit was instituted on the 21st of February, 1917, twenty-four years after the execution of the bond. A day later, and it would on any view have been hopelessly out of time. Whether it was then maintainable is the question at issue. The sum claimed for principal and interest as at the date of the plaint was no less than Rs. 34,000, an amount far in excess of the value of the mortgaged property.

There were in the suit other issues than that of limitation. Although these no longer survive, their nature and the difficulty, perhaps the impossibility, of solving them satisfactorily so long after the event and with the two mortgagors dead, emphasises the embarrassment caused by the inexplicable delay of the mortgagees in putting their claims to the test. Shortly stated, they were these.

First, as has already been said, the mortgage is not executed by the lady, and the son, so the defendants alleged, had no authority to execute it on her behalf: the lady was literate and did not need to have deeds executed for her. It may be doubted whether the certain truth, on this issue, will ever be known. The trial Judge, however, in the result, repelled the plea of the defendants, and there that matter rests. A second defence to the suit was that no consideration for the mortgage had been received by the mortgagors. This defence was, in part, successful. The trial Judge, after prolonged inquiry, held that Rs. 3,000 and no more had been advanced by the mortgagees. To this view the High Court adhered, and that finding was not before their Lordships further questioned by the appellants. On the other hand, the plaintiffs alleged that the mortgagees had received

1926

PANCHAM
v.
ANSAR
HUSAIN.

from time to time instalments on account from the mortgagors. This allegation of theirs has been rejected and is no longer persisted in. This particular matter, however, is referred to now, only as an introduction to the next statement. It will be more conveniently dealt with in a later portion of this judgement. So far, the result upon which their Lordships must act is that there is a mortgage of immovable property duly executed by the predecessors in title of the defendants to secure an advance of Rs. 3,000, repayable in 12 years with interest at the rate of 10 per cent. per annum capitalized in case of non-payment. Thereunder the mortgagors are taken bound to pay Rs. 500 in every year on account of principal and interest, but no payment whatever on any account has been made since the date of the mortgage, the 21st of February, 1893. Is a suit to enforce such a security, commenced on the 21st of February, 1917, barred by statute? That is the question.

If there were no more to be said it is on all hands agreed that great as is the delay the answer must be in the negative. The suit is one to enforce payment of money charged upon immovable property to which article 132 of schedule I of the Limitation Act applies. The period of limitation fixed by that article is 12 years from the date when the money sued for became due. The date by the deed fixed for payment of principal and capitalized interest was the 21st of February, 1905, and the plaint in the suit is filed within 12 years of that date, viz., the 21st of February, 1917.

But the mortgage bond contains a further clause to which no reference has so far been made. The clause is as follows :—

“ Moreover be it known that if the hypothecated property is advertized for sale or sold out in execution of the decree of any other decree holder, or on account of the arrears of the

Government revenue, or if any one else acquires any right to the hypothecated property, or if there is any breach of faith, or any default in payment of rupees five hundred per annum, as aforesaid, on the part of us, the executants, or if there appears to the aforesaid creditor, any weak or strong apprehension of the loss of the principal or of the hypothecated property, then in all or any particular circumstances, the aforesaid creditor has power, without waiting for the expiry of the stipulated period, and by cancelment of the stipulations embodied in this document, to institute a suit in court, to obtain a decree, and to realize the entire principal together with interest and costs, from our person and from our hypothecated property specified at the foot."

1926

PANCHAM
v.
ANSAR
HUSAIN.

This was the clause by reference to which the High Court, taking cognizance only of the fact that the mortgagors had made default in payment to the mortgagees on the 17th of February, 1894, of the stipulated sum of Rs. 500, decided the issue of limitation in favour of the respondents. Applying certain previous decisions of that Court, and in particular a Full Bench decision in *Gaya Din v. Jhumman Lal* (1) the High Court held that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire, operates *eo instanti*, to make the money secured by the mortgage "become due," so that all right of action in respect of the security is finally barred 12 years later, that is, in the present case, on the 21st of February, 1906. All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors, and notwithstanding that the proviso is exclusively for the benefit of the mortgagees. The decision also apparently proceeds upon the view that the words of the

(1) (1915) I.L.R., 37 All., 400

1926
PANCHAM
v.
ANSAR
HUSAIN.

English Limitation Act and the English decisions thereon apply without question to the words of article 132 of the schedule to the Indian Limitation Act--a conclusion which, as it seems to their Lordships, may involve, and, on the critical point when applied to such a proviso as the present, a large assumption.

Their Lordships are fully alive to the seriousness of the view so taken by the High Court, emphasized and perhaps extended as it has been by a later Full Bench decision to the same effect: See *Shib Dayal v. Meharban* (1). Moreover, upon the correctness of it there has been in different High Courts of India a sharp conflict of judicial opinion. It is accordingly manifestly desirable that, so soon as may be, this Board should finally pronounce not only upon the question whether the principle of the two decisions above referred to is correct, but also upon the further question whether, even if it is, these decisions have any application to a proviso framed as is that now in suit. Their Lordships would be reluctant, however, to pronounce on either question in the absence of full argument, and it is accordingly a satisfaction to them to find that the present case, in which they have had no assistance from the respondents, can, as they think, regardless of the general question, be decided on its own special circumstances which, apparently, the High Court was not concerned to note.

The position is this. Whatever else in relation to such provisos as the present may be open to debate, one thing is clear, viz., that such a default on the part of the mortgagors as was here relied on by the High Court gave to the mortgagees a right by appropriate action to make the mortgage moneys immediately due, and the special circumstance in this suit is, that, from

(1) (1922) I.L.R., 45 All., 27.

the date of their amended plaint in it, the appellants' case necessarily imported that the mortgagees had— if it was necessary for them so to do—brought about that state of things, and that the appellants' right to a decree was to be judged of on that basis. A short reference to the plaint and amended plaint will make this clear.

1926

PANCHAM
v.
ANSAR
HUSAIN.

In fulfilment of the obligation in that behalf imposed on plaintiffs by order VII, rule 1(e), of the Code of Civil Procedure, paragraph 7 of the plaint alleged as follows :—

“ The cause of action for this suit accrued on the 21st of February, 1905, . . . within the local limits of the jurisdiction of this court. The case is cognizable by this court.”

The plaint presented in this form on the 21st of February, 1917, was, in pursuance of order VII, rule 11(d) of the Code, on the 23rd of February, 1917, rejected with this note :—

“ Under the terms of the mortgage deed, the cause of action for this suit accrued to the plaintiffs on the 21st of February, 1894, when the first instalment was not paid. The suit is beyond time with reference to the said date. The plaintiffs have not shown in the plaint why the suit is not time-barred.”

The reference there, of course, is to order VII, rule 6 of the Code.

In consequence of this deliverance the plaintiffs under order amended paragraph 7 of their plaint, and it was on that paragraph as so amended that they went to trial.

The amended paragraph runs as follows :—

“ The cause of action for this suit accrued on the 21st of February, 1894, . . . within the local jurisdiction of this court, as also on other different dates, namely, the 15th of

1926
PANCHAM
v.
ANSAR
HUSAIN.

December, 1899, the 9th of January, 1901, the 15th of February, 1902, the 15th of January, 1903, the 16th of January, 1904, and the 10th of April, 1906, when the interest was paid. The case is cognizable by this court."

In their Lordships' judgement the meaning of this amended allegation is not to be mistaken. First of all the plaintiffs thereunder definitely abandon the contention on which their whole appeal now rests, viz., that their cause of action did not accrue until the 21st of February, 1905. Secondly, the plaintiffs' assertion that the cause of action accrued to them on the 21st of February, 1894, an allegation be it remembered which is not traversed in any written statement, involves the assertion that all conditions on their part were fulfilled if any had to be fulfilled, and that all things were done if any had to be done, to bring about that result, as well as an assertion that the result was attained. Further, the allegation now is that the suit, which would otherwise have been out of time, is exempted from limitation only by the payments of interest specified. That, henceforth, was the plaintiffs' only case, and it would have succeeded if these payments had been proved. But the plaintiffs' attempt to prove them, as has been stated, entirely failed, and no suggestion that any such payment had been made or received was even presented to the Board by the appellants' counsel. Having made a finding of fact in the same sense, the trial Judge, by his judgement of the 31st of May, 1918, dismissed the suit with costs. That was, their Lordships think, his proper course. No other issue was or is, on the pleadings, open to the plaintiffs, and their conduct in this matter is not such as to entitle them to claim any more than strict treatment. On their own chosen issue they fought: to that issue they directed evidence which was not believed: on it, therefore, they failed. And by

that failure they must abide. Their appeal to the High Court should have been dismissed, as their Lordships think, on the same ground. The contention which that Court combated by its deliverance already referred to was not on their pleadings open to the appellants, who, for the same reason, cannot on their appeal to this Board be heard to say, as they must say if the appeal is to succeed, that their cause of action did not accrue to them until the 21st of February, 1905, an allegation which, originally made, was, as has been seen, deliberately abandoned in their amended plaint.

Their Lordships accordingly, without pronouncing in any way upon matters which must one day call for most serious consideration at the hands of the Board, think that this appeal should be dismissed on the short ground that the appellants are committed to the position that their cause of action accrued to them on the 21st of February, 1894, and that their suit, in the absence of any payment or acknowledgement by the mortgagors, was barred long before the date on which it was instituted, in point of fact it was barred on the 21st of February, 1906.

On that ground their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellants: *A. De Frece and Co.*

1926

PANCHAM
v.
ANSAR
HUSAIN.

APPELLATE CIVIL.

1925
July, 27.

Before Mr. Justice Boys and Mr. Justice Banerji.

SHEO PRASAD (DECREE-HOLDER) v. NARAINI BAI
(OBJECTOR).*

Act No. IX of 1908 (Indian Limitation Act) schedule I, article 182—Application for execution—Validity of prior application in saving limitation—Necessity for good faith.

When considering whether an earlier application is effective to save limitation, the court may and should take into consideration whether the whole circumstances show that the application was made in good faith to secure execution, or to take a step in aid of execution, and was not merely colourable with a view to give a fresh starting point for the period of limitation.

The facts of the case, so far as they are necessary for the purposes of this report, are as follows :—

Lala Sheo Prasad, appellant, obtained a simple money decree against Isri Prasad, husband of Musamat Naraini Bai, respondent, in the court of the Munsif of East Budaun on the 9th of March, 1915. On the 12th of November, 1918, he applied for execution. On the 23rd of January, 1920, this application was struck off with the consent of the decree-holder. On the 4th of March, 1921, he applied again for execution to the Munsif of East Budaun. The relief asked for in that application was that certain property be attached and brought to sale.

On the 19th of April, 1921, if not before, the attention of the decree-holder was drawn to the fact that all the property, for attachment and sale of which he prayed, was outside the jurisdiction of the Munsif of East Budaun and he was ordered to explain how

* Second Appeal No. 1300 of 1924, from a decree of Rup Kishen Agha, Subordinate Judge of Budaun, dated the 8th of March, 1924, confirming a decree of Ganga Dhar Panth, Munsif of East Budaun, dated the 11th of August, 1923.

1925

SHEO
PRASAD
v.
NARAIN
BAI.

the court had any power to proceed against it. Pending that explanation being received, the application was to remain pending. On the 29th of April, 1921, as no explanation had been given by the decree-holder, the application was dismissed and on the same date he took back all the process-fees that he had deposited. A further application was filed by the decree-holder for execution on the 12th of January, 1923. This time the property detailed was within the jurisdiction of the Munsif of East Budaun; but he dismissed the application holding that it was barred by limitation, limitation not being saved by the previous application of the 4th of March, 1921, in that that application was not in accordance with law, as the property was outside the jurisdiction of the court and no application had been made, even after opportunity had been given, to transfer the decree to the court in whose jurisdiction the property was situate. In appeal the Subordinate Judge held that the application was made to the proper court and concurred with the Munsif that it was not in accordance with law and, therefore, could not save limitation.

It was not suggested that during the twelve days prior to the dismissal of the previous application on the 23rd of January, 1920, any act was done by the decree-holder which would bring his present application of the 12th of January, 1923, within the period of limitation.

Mr. *Agha Haider*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

The judgement of the Court (BOYS and BANERJI, JJ.), after setting out the facts as above, proceeded as follows :—

At an early stage of the case counsel for the appellant was asked whether, if it were to be held in the circumstances that the application was not made with

1925

SHEO
PRASAD
v.
NARAINI
BAL.

any *bonâ fide* intention of proceeding to execution but merely with the intention of saving limitation, it could rightly be held to be "an application for execution" or "a step in aid of execution." Counsel very frankly admitted that it was a very common practice for decree-holders to put in a colourable application asking for execution which they did not mean seriously to prosecute, but which they allowed to be dismissed, merely with the intention of relying upon the fact that they had made such an application in order to obtain a further period of three years before execution of the decree could be held to be barred by limitation. He urged that the test of whether the application was made in good faith with a real intention to proceed to execution was never applied.

It may be true to say that this aspect of such proceedings has been to a great extent lost sight of, but it is not accurate to say that the test has never been applied.

On general principles it would seem clear that the legislature when it used the phrases "application for execution" and "step in aid of execution" had in mind a *bonâ fide* intention on the part of the decree-holder to proceed with his right to have execution. It does not seem possible that the legislature should have ever contemplated an indefinite period being added to the life of a decree by permitting a decree-holder to take colourable steps in a very thinly disguised pretence of a desire to obtain execution when he really did not want execution at all, but only wanted to secure a further period of limitation during which the amount of his decree might go on increasing. It would, therefore, seem on the face of it a proper interpretation of the words "for execution" and "step in aid of execution" that the decree-holder must really be desiring execution, and that the words

cannot be read as "an application made with the sole object of extending the period of limitation" and "a step taken with the sole object of extending limitation." The words "for execution" mean "for the purposes of obtaining execution" and the words "step in aid of execution" mean "step taken for the purpose of obtaining execution." This, which appeared upon a consideration of article 182 to be a natural and proper interpretation, research has shown to have the support of weighty judicial authority, though the decisions would seem to have been to some extent lost sight of, or if we may say so, misinterpreted.

[Reference was then made to the decisions of their Lordships of the Privy Council in *Roy Dhunput Singh v. Mudhomotee Dabra* (1), *Hira Lal v. Badri Das* (2) and *Mungul Pershad Dichit v. Grija Kant Lahiri* (3); and later cases of the Indian Courts up to the year 1900,—*Mahtab Kuar v. Sham Sundar Lal* (4), *Chattar v. Newal Singh* (5), *Mangal Sen v. Baldeo Prasad* (6), *Adhar Chandra Dass v. Lal Mohun Das* (7), *Gopal Chunder Manna v. Gossain Das Kalay* (8) and *Jahar v. Kamini Debi* (9); and the judgement continued:—]

The above cases suffice to show that the application of the test of *bona fides* to determine whether an application is really one for execution is not novel.

It is only necessary to note that though there are differences between the contents of section 20 of Act No. XIV of 1859 and of article 182 of schedule I of the present Act No. IX of 1908, there is no difference that is material to the matter we are considering.

(1) (1872) 11 Beng. L.R., 23.

(2) (1880) I.L.R., 2 All., 792.

(3) (1881) I.L.R., 8 Calc., 51.

(4) Weekly Notes, 1888, p. 272.

(5) (1889) I.L.R., 12 All., 64.

(6) Weekly Notes, 1892, p. 70.

(7) (1897) I.L.R., 24 Calc., 778.

(8) (1898) I.L.R., 25 Calc., 594.

(9) (1900) I.L.R., 28 Calc., 233.

1925

SHEO
PRASAD
v.
NARAIN
Bai.

1925

SHEO
FRASAD
v.
NARAINI
BAL.

The words in section 20 were "no process of execution," the words in article 182 are "no application for execution, or to take some step in aid of execution." In neither section is there any specific mention of *bona fides*. In their Lordships held that *bona fides* was necessary to make "a process for execution" effective, it follows that the same interpretation should be put on the words "application for execution" or "step in aid of execution."

Counsel for the appellant stated that since 1871 the *bona fides* or *malla fides* of the application has been immaterial. He did not develop this proposition beyond relying on a passage that he quoted from a commentary. It is true that the author makes that statement, but we have not been able to find any real support for it in the authorities quoted by him.

The idea, in so far as it exists, would appear to have its origin in the decision of the Full Bench, *Eshan Chunder Bose v. Prannath Nag* (1). In that case JACKSON and McDONELL, JJ., in their referring order, wanted to maintain the incorporation of the principle of *bona fides* to stop a succession of colourable applications.

The idea underlying both the referring judgement and that of the Full Bench was that the question was whether the later application could be refused, being held to be colourable, merely because the previous application had been colourable, i.e., *malá fide*, as indicated by the fact that the decree-holder had allowed it to go by default.

Clearly the Full Bench was right in holding that the later application could not be refused merely for that reason. The decree-holder was entitled to make an application, and until he defaulted in prosecuting

(1) (1874) 22 W.R., 512.

it (when it would for that reason be struck off) it could not be known whether that latest application was being made with a *bonâ fide* intention to proceed, or not. The later application might well be made with a *banâ fide* intention to proceed, though the previous one was not, and the later could not, therefore, be treated as *malâ fide* merely because the earlier was such.

But the proceedings on the earlier application having *ex hypothesi* been concluded, it would be possible to determine whether the facts showed it to have been *malâ fide*, and, if it was, then, though it could not be held to show that the later application was also *malâ fide*, it could be held not to be an application "for execution," i.e., "intended to obtain execution" and, therefore, ineffective to save limitation.

The two aspects are quite distinct. The former was clearly before the Full Bench; the latter was not; and on the principle stated in *Quinn v. Leathem* (1), particular phrases used by COUCH, C. J., should not be treated as governing a question not directly considered.

JACKSON, J., when reluctantly concurring, remarked that inasmuch as the legislature must be supposed to have been aware of the earlier decisions incorporating the rule of *bona fides* into section 20 of Act No. XIV of 1859 and "as I suppose it designedly omitted to incorporate in the Act (of 1871) the principle of those decisions, I think we ought now to abstain from qualifying the precise terms of the Act."

It would seem, however, that the legislature would presumably have only legislated if it disagreed with the principle already strongly affirmed judicially.

We think that it is clear from the cases later in date that we have quoted, that the principle has been

(1) (1901) A.C., 495 (506).

1925

SHEO
PRASAD
P.
NARAINI
EAL.

1925

SHEO
PRASAD
v.
NARAINI
BAL.

frequently recognized that the *bona fides* or *mala fides* of the earlier application is an important ingredient in determining whether that application is effective to save limitation for the later application; though the *bona fides* or *mala fides* of the later application cannot be judged at the time that it is presented from anything that has gone before and, therefore, cannot at the time of presentation be entered into.

It is impossible to hold that the application of the 4th of March, 1921, was a *bonâ fide* application with the intention of obtaining execution. It was merely a colourable application intended to save limitation and with that intention only. Such applications made only with the intention of keeping the decree alive have, it may further be noted, since 1877 been dropped out of the appropriate article of the Limitation Acts.

We have been asked to remand the case. We see no reason to do so as we have the whole history of the case before us. Counsel for the appellant, who has displayed great industry on behalf of his client, has had more than a month since the question was raised at the first hearing before us, in which to consider this matter of the good or bad faith of the earlier application, and it is certainly no fault of his if he has been unable in the circumstances of the case to take up any other position than that decree-holders habitually file colourable applications merely to save limitation and allow the debt to accumulate and that the question of their *bona fides* is never challenged. As we have shown, it cannot be challenged at the time of presentation and if the application is not prosecuted it is struck off, but it can be and should be challenged when the application comes to be used to save limitation. Further, we may note that a remand could not

in any event avail the appellant for, as we shall proceed to show, the appeal must fail on a second ground also.

This being our view of the law and of the facts, we hold that the application of the 4th of March, 1921, was not an application "for execution" or "a step in aid of execution" and that the application of the 12th of January, 1923, was barred by limitation and the appeal must be dismissed.

[Their Lordships then dealt with the second ground and dismissed the appeal.]

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Dalal.

RAM DEVI AND OTHERS (DEFENDANTS) *v.* GANESHI LAL (PLAINTIFF) AND RAJENDRA KUMAR BHATTACHARYA AND OTHERS (DEFENDANTS).*

1926
March, 2.

Civil Procedure Code, schedule II, paragraph 21—Arbitration—Reference without intervention of court—Insolvency—Matters in dispute between receiver and secured creditors—Effect of award on decrees already passed and suits pending.

During the pendency of insolvency proceedings various litigations arose between the receiver, the secured creditors and the holders under certain transfers, alleged to be fictitious, which had been made by the insolvent, with regard to the realization of assets and the payment of debts. All the parties eventually agreed to refer the whole matter to arbitration without the intervention of the court, the agreement providing "that a decree in terms of the award would be accepted by the parties and that any decree passed by the court during the pendency of the arbitration proceedings would be subject to the award and would be modified in accordance with it." The award subsequently passed directed (1) the parties to modify in accordance with the award the decrees

* First Appeal No. 64 of 1925, from an order of Nadir Husain, second Additional Subordinate Judge of Aligarh, dated the 18th of March, 1925.

1926

RAM
DEVI
v.
GANESHI
LAL.

which might be passed by the courts in the pending suits, and (2) the receiver to bring the insolvent's property, which was revenue paying and ancestral, to sale and realize the sale proceeds through the court. It was found that the objectors to the award, who were plaintiffs in two suits, continued to take part in the arbitration subsequent to the suits. *Held*, that the award was valid and, therefore, binding on the parties. The award was to be deemed an adjustment, under order XXI, rule 2, of the Code of Civil Procedure, of the decrees which had already been passed; and if any suits were still pending, the award might be filed by way of defence and a decree obtained on foot thereof. *Gajendra Singh v. Durga Kunwar* (1), and *Mannilal Motilal v. Gokaldas Rawji* (2), followed.

Where there is an agreement to refer to arbitration, the court has the power in its discretion to refuse a party the alternative of a court of law, and thus to force him to proceed by arbitration. Parties can deprive themselves of the right of recourse to a court of law by their own act, as, for example, by going on with the arbitration and obtaining an award. *Doleman and Sons v. Ossett Corporation* (3), referred to.

THE facts of this case were as follows:—

One Bijai Indar Singh was adjudged an insolvent and a receiver of his property was appointed. The insolvent was out of possession and in the opinion of the receiver some of the properties were fictitiously sold. Litigation therefore arose between the receiver and certain persons who were in possession of the insolvent's property. Finally, the secured creditors, the persons in possession of the property, and the receiver entered into an agreement on the 28th of February, 1923, to refer the matter relating to the amount and the payment of the secured and unsecured debts to arbitration. The first arbitrator died in the following September, and on the 4th of November, 1923, the parties, with the exception of two, appointed Babu

(1) (1925) I.L.R., 47 All., 637.

(2) (1920) I.L.R., 45 Bom., 245.

(3) (1912) 3 K.B., 257.

1926

RAM
DEVI.v.
GANESHI
LAL.

Manni Lal, pleader, as a new arbitrator. The award was made on the 4th of June, 1924.

Ganeshi Lal, one of the parties to the arbitration, applied for the filing of the award under paragraph 21 of the second schedule to the Code of Civil Procedure. This application was opposed by several of the other parties, viz., Musammat Ram Devi, widow of Sheo Prasad, for herself and her minor son, a second Musammat Ram Devi, wife of Bhola Nath and Jai Deo Prasad for himself and his minor nephews. The Court of first instance (Second Additional Subordinate Judge of Aligarh) ordered the award to be filed. Against this order the objectors other than Ram Devi wife of Bhola Nath appealed to the High Court.

The appellants contended that the award was illegal on the face of it and that the court should have refused to file it. The reasons for the alleged illegality were two, (1) that the award gave an illegal direction to the parties for the settlement of pending suits and existing decrees, and (2) that the direction given to the receiver to bring the property to sale and realize the sale proceeds through the court was illegal, having regard to the provisions of section 60 of the Provincial Insolvency Act.

Dr. *M. L. Agarwala*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

The judgement of DALAL, J., after setting forth the facts as above, thus continued :—

It was first urged that the discretion in the award to the parties to modify the decrees duly passed by courts of law amounted to an ousting of the jurisdiction of the court and was therefore illegal. Reference was made to a Bench judgement of the Calcutta High

1926

RAM
DEVI
v.
GANESHI
LAL.

Court in *Ram Prosad, Surajmull v. Mohan Lal Lachminarain* (1). In delivering the judgement of the Court, MUKERJEE, J., placed reliance on the case of *Doleman and Sons v. Ossett Corporation* (2) and explained the views adopted by FLETCHER MOULTON, L. J. and FARWELL, L. J. According to FLETCHER MOULTON, L. J., the law would not enforce the specific performance of an agreement to refer to arbitration, but if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the court has refused to stay an action or if the defendant has abstained from asking it to do so, the court has seisin of the dispute, and it is by its decision and by its decision alone, that the rights of the parties are settled. It follows that in the latter case, the private tribunal, if it has ever come into existence, is *functus officio*. There cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. The view adopted by FARWELL, L. J., did not carry the right of the jurisdiction of the court to that length. He agreed that the plaintiffs cannot be deprived of the right to have recourse to the court when the agreement is a mere agreement to refer, but he added that they can deprive themselves of such rights by their own act after writ, as, for example, by going on with the arbitration and obtaining an award; but when nothing has been done by them since writ and the only matter relied upon is an award made since writ, without their knowledge or consent, under an agreement antecedent to the action, the plea is in fact and in truth a plea of the agreement and is bad, because there is no act of the

(1) (1920) I.L.R., 47 Cal., 752.

(2) (1912) 3 K.B., 257.

plaintiffs subsequent to the writ on which reliance can be placed. It is obvious to us that the present case falls within the exception formulated by FARWELL, L. J. In the agreement itself to refer to arbitration there was a provision that if a case be pending at the time between the parties, relating to debts due by or property belonging to Bijai Indar Singh, it would be deemed to have been disposed of according to the award, meaning that a decree in terms of the award would be accepted by the parties, and that if during the pendency of the arbitration proceedings a decree be passed, the decree of the court would be subject to the award and would be modified in accordance with the award. The appellants, who were plaintiffs in two suits, continued to take part in the arbitration proceedings subsequent to the suits. There was thus, to follow the opinion of FARWELL, L. J., nothing illegal in the arbitrator delivering his award in spite of the decrees of court and directing that the decrees may be modified by the parties in terms of the award. The parties themselves had the decrees of court in contemplation and in anticipation of those decrees had agreed that they would execute the decrees in a particular form and not in the form in which they would be granted by court. As the plaintiff had agreed to such an arrangement, he cannot compel the defendant and judgement-debtor of those decrees to accept the decision of the court.

In our opinion the award is an adjustment of the decrees under order XXI, rule 2, of the Code of Civil Procedure. Both the decree-holder and the judgement-debtor are entitled to draw the attention of the executing court to an adjustment after the decree. So far as we understand the facts of the case, decrees have been obtained by the appellants on foot of two mortgages and the third claim is in itself a decree.

1926

RAM

DEVI

v.

GANESHI

LAL.

1926

RAM
DEVI
v.
GANESHI
LAL.

The observations of Mr. Justice WALSH in a case where the matter in dispute was referred to arbitration during the pendency of an appeal without the intervention of the court and the appellate court was desired to pass a decree in terms of the award, may be quoted [*Gajendra Singh v. Durga Kunwar* (1)] :—

“ Speaking for my own part, I am not satisfied that any question of law arises at all. The agreement before us is such that upon general principles of law I am not satisfied that it is necessary to apply any provision of the Code. The provisions of the Code only apply to such proceedings as purport to be taken thereunder. It happens from time to time that things are done by the consent of parties without reference to any special provision of the Code. It also happens sometimes that the parties are governed by some general principles of law, analogous to a provision in the Code, which is not actually to be found in the Code. The most familiar illustration of that is where there is a binding decision in interlocutory proceedings, in the course of a suit, and one of the parties seeks to question it at a later stage. The Privy Council have held that the decision between the parties in the course of a suit is governed by the principles of *res judicata*, independently altogether of the special provisions of section 11 of the Code, and indeed there is no provision of the Code which applies to it.”

In that case, which was heard by a Bench of three Judges, the majority of Judges held in favour of the award being binding on the parties.

We have dealt so far with the modification of decrees of court. If any suits are pending, the award may be filed by way of defence and a decree can be obtained on the basis thereof. Such was the opinion of a Bench of the Bombay High Court in *Manilal Motilal v. Gokaldas Rawji* (2). In his judgement FAWCETT, J., quoted FARWELL, L. J., in *Doleman and Sons* already referred to, that it is always possible to settle the differences between the parties as they please.

(1) (1925) I.L.R., 47 All., 637.

(2) (1920) I.L.R., 45 Bom., 245.

Now we come to the second objection. Under section 60 the receiver cannot sell ancestral and immovable property paying revenue to Government but has to submit a statement to the Collector who may act under paragraphs 2 to 10 of the third schedule of the Code of Civil Procedure and farm or manage the property and pay the income to the receiver. The parties to these proceedings however are all secured creditors and the order of adjudication does not bind them. It is enacted in section 28, which details the effect of an order of adjudication, that nothing in that section shall affect the power of any secured creditor to realize or otherwise deal with a security in the same manner as he would have been entitled to realize or deal with it as if this section had not been passed. Section 47 deals with rights of secured creditors who can realize the security and prove only for the balance due. They can of course prove for the whole debt on relinquishing the security, but in the present case the secured creditors have obtained decrees and there is no allegation that they have relinquished the security. The arbitrator who was a man of law has provided for the receiver failing to sell the property within a certain time (which has long expired by now) by empowering the decree-holders to bring the property to sale in execution of the decrees, to realize the sale proceeds in terms of the award and to get the decrees struck off as having been satisfied in full. The Insolvency Act has no provision to prevent secured creditors from acting accordingly. We, however, do not suggest that this should be done. Possibly the better way would be to obtain the insolvent's discharge under section 38 and deal with the property outside the jurisdiction of the insolvency court. The receiver will then cease to be a receiver under insolvency but he is a person vested by the

1926

RAM
DEVI
v.
GANESHI
LAL.

1926

RAM
DEVI
v.
GANESHI
LAL.

arbitrator with authority to sell the property under the arbitration provisions and would be able to sell the property under the terms of the award.

[The last objection dealt with an alleged error on the face of the award, in ignoring the admitted priority of certain debts, but the Court held that this objection failed, and continued :—]

The learned Subordinate Judge has written an able judgement and we are in entire agreement with the findings recorded by him. The appeal is dismissed with costs.

WALSH, J.—I have read the judgement of Mr. Justice DALAL and agree with it, and with the order proposed.

Appeal dismissed.

Before Mr. Justice Daniels and Mr. Justice King.

1926
May, 25.

BIJAI INDAR SINGH (OBJECTOR) v. CHARAN SINGH
(OPPOSITE PARTY).*

Act No. V of 1920 (Provincial Insolvency Act), sections 4, 28, 34—Insolvent—Permission to institute suit against undischarged insolvent not inclusive of permission to execute the decree.

Inasmuch as the entire property of an insolvent, when once an order of adjudication has been made, vests in the court or the receiver, it follows that permission given to a creditor to institute a suit against an insolvent does not imply permission to execute the decree which may be obtained against the property of the insolvent.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. G. W. Dillon, for the appellant.

Dr. Kailas Nath Katju, for the respondent.

DANIELS and KING, JJ.:—This appeal arises out of an order passed in execution proceedings against a

* Second Appeal No. 433 of 1926, from a decree of J. Allsop, Additional Judge of Aligarh, dated the 2nd of December, 1925, confirming a decree of Mirza Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 21st of March, 1925.

declared insolvent. It appears that the decree-holder obtained the permission of the insolvency court under section 28 of the Provincial Insolvency Act, 1920, to institute a suit against the insolvent and a decree was obtained against the insolvent on the basis of a promissory note executed on the 5th of September, 1920, i.e., some years after the date on which he was adjudged an insolvent. The decree-holder subsequently applied to execute the decree by the attachment of certain movable property belonging to the insolvent. The judgement-debtor raised an objection that his property was not liable to attachment so long as he remained an undischarged insolvent. Under section 28(2) the effect of the order of adjudication is to vest the whole of the property of the insolvent in the court or in the receiver, and under sub-section (4) any property acquired by the insolvent after the date of the order of the adjudication also vests in the court or the receiver. It seems clear, therefore, that this property which the decree-holder seeks to attach does not belong to the judgement-debtor and is not liable to attachment under section 60 of the Code of Civil Procedure because it does not belong to the judgement-debtor but vests either in the court or in the receiver. In the present case it appears that there is at present no receiver, since the receiver who was appointed originally, died and no one has been appointed in his place. The property, therefore, vests in the court.

It has been argued that as the court gave permission for the institution of this suit, the permission for instituting the suit should be held to cover permission for executing any decree obtained in the suit.

Under section 28 the permission of the court is required for any "suit or legal proceeding" against

1926

BIJAI
INDAR
SINGH
v.
CHABAN
SINGH.

1926

BIJAI
INDAR
SINGHCHADAN
SINGH.

an undischarged insolvent, and we hold that permission to institute a suit does not necessarily cover permission to execute a decree obtained in that suit. A court might grant permission to institute a suit in order to obtain a judicial determination regarding a debt but it would not necessarily follow that the court would sanction the execution of a decree by sale of property in the possession of the judgement-debtor. This would prejudice the rights of scheduled creditors to share rateably in the assets.

In the present case it appears that sanction for the institution of the suit was, strictly speaking, unnecessary since the suit was not "in respect of any debt provable under this Act." The debt was incurred on the basis of a promissory note executed after the date of the adjudication and so does not fall within the definition of a "debt provable under the Act" under section 34. But whether such permission was required or not, it is clear that the property which the decree-holder seeks to attach does not belong to the judgement-debtor but vests in the insolvency court and therefore is not liable to attachment. Although the insolvency court itself has raised no objection, we cannot permit the decree-holder to attach property which does not belong to the judgement-debtor but vests in the court. We accordingly allow the appeal and declare that the property is not liable to be attached in execution of the decree. In view of the fact that the debtor incurred the debt while he was an undischarged insolvent we make no order as to costs.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

1926

MARU (PLAINTIFF) *v.* HANSO AND OTHERS (DEFENDANTS). * *March, 3.*

Hindu law—Widow's estate—Hindu widow divesting herself of her estate not obliged to do so by one single act—Legal necessity.

If a Hindu widow brings about a complete effacement of herself with the result that the entire estate vests in the next reversioner, it is not necessary that the surrender should be effected by one act, nor has the question of legal necessity any thing to do with such a surrender.

Behari Lal v. Madho Lal Ahir Gayawal (1), Rangasami Gounden v. Nachiappa Gounden (2), Bajrangi Singh v. Manokarnika Bakhsh Singh (3), Bhagwat Koer v. Dhanukdhari Prasad Singh (4), and Rao Bahadur Man Singh v. Maharani Nowlakhbati (5), referred to.

THE facts of this case were as follows :—

One Ghasita, the last male owner of the property in suit, died leaving three daughters. On the death of the first the names of the two surviving daughters, Musammat Sundar and Musammat Hanso, were recorded in the revenue papers in equal shares. Musammat Sundar died about 1897 and on her death it is admitted in the plaint that Musammat Hanso caused the name of Sundar's son Bhartu to be entered in the revenue papers in place of her name as against the half share in her possession. Later on Musammat Hanso executed a deed of gift in 1916 with regard to the remaining half share in favour of Bhartu and got Bhartu's name recorded. On Bhartu's death the names of the defendants Nos. 2 to 4, his sons, were caused to be recorded in the revenue papers by Musammat Hanso.

* First Appeal No. 215 of 1922, from a decree of P. K. Ray, Subordinate Judge of Meerut, dated the 10th of March, 1922.

(1) (1891) I.L.R., 19 Cal., 296.

(2) (1918) I.L.R., 42 Mad., 523.

(3) (1907) I.L.R., 30 All., 1.

(4) (1919) I.L.R., 47 Cal., 466.

(5) (1925) I.L.R., 5 Pat., 290.

1926

MARU
v.
HANSO.

The plaintiff came into court claiming the property so disposed of, as heir to Ghasita. He asserted that in spite of the entry of the name of Bhartu, Musammat Hanso herself remained in possession of the property. The contesting defendants denied that Musammat Hanso remained in possession of any portion of the property after the said transfer and pleaded that these transfers amounted to a complete effacement of the Hindu daughter's interest and a surrender in law in favour of the defendants' father. The learned Subordinate Judge has found as a matter of fact that Musammat Hanso divested herself of all interests in the two portions of the property by two successive stages and that she did not remain in possession of the property after the transfers. The learned Judge has found that the entire effect of these transactions was that a legal surrender took place in favour of Bhartu. He accordingly dismissed the suit.

The plaintiff appealed. He did not contest the facts as found by the trial court, but contended that the acts of Musammat Hanso did not amount to a legal surrender of her interest in the property.

Munshi Shiva Prasad Sinha (for Dr. N. C. Vaish), for the appellant.

Mr. B. E. O'Connor, for the respondents.

THE judgement of the Court (SULAIMAN and MUKERJI, JJ.), after reciting the facts as above, thus continued :—

The only point urged before us is that in order to be valid as a complete surrender it is not only necessary that the surrender must be in respect of the entire estate but that it must also take effect simultaneously and at one and the same time. The contention is that if the entire estate is transferred in favour of the next reversioner by successive steps, no legal surrender can

take place. The learned vakil for the appellant relies on the case of *Behari Lal v. Madho Lal Ahr Gayawal* (1). The passage relied upon is as follows :—

1926

MARU
v
HANSO.

“ It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested *at once* in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances.”

The argument is that the use of the expression “ at once ” by their Lordships indicated that the surrender must come into effect by one single act. This contention cannot be accepted. Their Lordships had before them an *ekrarnama* under which the limited owner had declared that she should, till the end of her life, hold possession of the estate and that it was only after her death that one Behari Lal was to enter into possession and enjoy the profits of the mauzahs. Their Lordships clearly meant that such a transfer was not an immediate transfer of the estate so as to amount to a surrender, because it was to take effect not at once but after her life time. The next case relied upon on behalf of the appellant is the case of *Rangasami Gounden v. Nachiappa Gounden* (2). Their Lordships in that case approved of the statement of law made by Lord MORRIS in *Behari Lal's* case. But a careful perusal of that judgement really destroys the appellant's argument. It may be noted that in a previous case decided by their Lordships of the Privy Council, viz., *Bajrang Singh v. Manokarnika Bakhsh Singh* (3), successive sale-deeds executed by a Hindu widow with the consent of all the reversioners who were then alive, had been upheld by their Lordships. The language of the concluding portion of the judgement was such as to lead some courts to suppose

(1) (1891) I.L.R., 19 Cal., 236 (241) (2) (1918) I.L.R., 42 Mad., 523.

(3) (1907) I.L.R., 30 All., 1.

1926

MARU
v.
HANSO.

that the consent of all the reversioners for the time being is absolutely sufficient and conclusively establishes the validity of such a transfer. Their Lordships in *Gounden's* case referred to this previous case and explained it. At page 547, their Lordships pointed out that the Calcutta view had been affirmed against the Allahabad view, but the judgement did not particularise on what exact ground the allegation was supported. Their Lordships then pointed out that in that particular case, viz., *Bajrangi Singh's* case, the decision might possibly have been supported by either of the two grounds :—

(1) “ Although there were three successive alienations they *in cumulo* amounted to an alienation of the whole immovable property;”

(2) “ But apart from that the alienations were all made for purposes of ostensible necessity.”

This judgement clearly shows that their Lordships had in mind that successive alienations can be validly supported if the cumulative effect of these is an alienation of the whole estate in favour of the next reversioner. This observation of their Lordships militates against the suggestion that no surrender can take place unless it be by one act. The subsequent case of *Bhagwat Koer v. Dhanukdhari Prasad Singh* (1) is not directly in point. Lastly, reliance has been placed on the recent case of *Rao Bahadur Man Singh v. Maharani Nowlakhbati* (2). And it is urged that no surrender can take place unless it is supported by necessity. The case referred to is no authority for such a novel proposition of law. Their Lordships clearly re-affirmed their view in *Gounden's* case and remarked that where a surrender of her whole interest in the whole estate in favour of the nearest reversioners

(1) (1919) I.L.R., 47 Calc., 466. (2) (1925) I.L.R., 5 Pat., 290.

takes place, the question of necessity in such circumstances does not fall to be considered. The question of necessity arises when there is only a partial surrender or transfer.

1926

MARU
v.
HANSO.

On general principles also we see no good ground for holding that if a widow brings about a complete effacement of herself with the result that the entire estate vests in the next reversioner, though the same might have been obtained by a process consisting of several stages, there is no legal transfer. In our opinion, therefore, the appeal has no force and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

1926

CHUNNI SINGH (DEFENDANT) v. LAKSHPAT SINGH
(PLAINTIFF) AND BHUREY KHAN AND OTHERS (DEFENDANTS).*

March, 4.

Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 16 and 22—Pre-emption—One sale-deed conveying separate items of property to separate purchasers—Pre-emptor not obliged to implead purchasers other than the one in whose particular purchase he is interested.

By one sale-deed several items of property were sold to different purchasers for different amounts of consideration. *Held* that a person wishing to pre-empt one particular item of the property so sold was not obliged to implead any of the purchasers other than the one concerned with the particular item in which he was interested. *Lachhman v. Tulsi Ram* (1), referred to. *Brij Narain Rai v. Ram Dhari Rai* (2), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

* Second Appeal No. 223 of 1926, from a decree of Makhan Lal, Additional Subordinate Judge of Bulandshahr, dated the 26th of October, 1925, reversing a decree of Syed Nawab Hasan, Munsif of Khurja, dated the 24th of March, 1925.

(1) (1905) 2 A.L.J., 199.

(2) (1916) 40 Indian Cases, 40.

1926

CHUNNI
SINGH
v.
LAKSHPAT
SINGH.

Pandit *Shiam Krishna Dar* and Babu *Surendra Nath Gupta*, for the appellant.

Appeal heard under order XLI, rule 11, of the Code of Civil Procedure.

SULAIMAN and MUKERJI, JJ. :—This is a defendant's appeal arising out of a suit for pre-emption. By one document, dated the 29th of January, 1924, nine items of properties were sold to nine different vendees for different amounts of consideration; but there was only one document executed and registered, as the entire properties belonged to one set of vendors. Among these vendees was one Kanchan Singh, who admittedly was a co-sharer in the property purchased by him. The plaintiff has brought a suit for pre-emption against the appellant Chunni Singh only in respect of the item of the property purchased by him under the sale-deed. This property was separately earmarked as property having been purchased by Chunni Singh, a separate amount of the sale consideration was mentioned and the other vendees had no joint interest in this property at all. The first court dismissed the claim on the ground that this was a case of partial pre-emption, which disqualified the pre-emptor from obtaining a decree. The appellate court, in view of the specification of the shares in the sale-deed, has come to a contrary conclusion.

Although there was only one document different items of properties were sold to different persons and, therefore, there were really nine different contracts. The contention before us is that it was the duty of the plaintiff to have brought the suit against all the other vendees. This contention cannot be accepted. If this transaction is to be deemed to consist of nine different transactions with nine different persons, then it was certainly open to the plaintiff to object to one vendee and not the others. That this was the view before the

new Pre-emption Act was passed cannot be doubted. We may only refer to the case of *Lachhman v. Tulsi Ram* (1), where, although one solitary amount was mentioned in the sale-deed for two items of properties, at the foot of the document details were separately given. It was held by a learned Judge of this Court that it was open to the plaintiff to maintain a claim for pre-emption of either of the two properties, although both had been purchased by the same vendee. The case of *Brij Narain Rai v. Ram Dhari Rai* (2), is distinguishable, because there properties in two mahals were sold for one consideration and there was apparently no specification of the different prices for the two mahals.

1922

CHUNNI
SINGH
v.
LAKSHPAI
SINGH.

Lastly, it is contended that the enactment of section 16 of the new Act has altered the position. We cannot accept this contention. The law has in no way been altered. As against the defendants vendees the plaintiff could not have claimed pre-emption in respect of any property which he has not included in this suit. The provisions of section 22 also go to suggest that, where a purchaser has a defined interest in the sale-deed, he cannot be said to have acquired the property jointly with others. The appeal accordingly fails and is dismissed.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

RANJIT SINGH (PLAINTIFF) v. BHAGWATI SINGH
AND ANOTHER (DEFENDANTS).*

1923
March, 12.

Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 14—Pre-emption—Estoppel by conduct.

Sections 14 and 15 of the Agra Pre-emption Act, 1922, do not mean that in no other case than where a notice is issued

* Second Appeal No. 2268 of 1925, from a decree of M. M. Sanyal, Additional Subordinate Judge of Jaunpur, dated the 25th of August, 1925, reversing a decree of the Munsif of Shahganj, dated the 30th of April, 1925.

(1) (1905) 2 A.L.J., 199.

(2) (1916) 40 Indian Cases, 40.

1926

RANJIT
SINGH
v.
BEAGWATI
SINGH.

to him can a co-sharer be estopped from claiming his right of pre-emption; where a co-sharer so conducts himself as to lead people generally to suppose that he had waived his own right of pre-emption it is open to the court to hold that he is estopped from thereafter asserting his claim.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Haribans Sahai*, for the appellant.

Appeal heard under order XLI, rule 11 of the Code of Civil Procedure.

SULAIMAN, and BANERJI, JJ.:—This is a plaintiff's appeal arising out of a suit for pre-emption. The lower appellate court has found that when this sale-deed was executed the plaintiff was present there all along; that in fact he took an active part in obtaining the sale-deed, and that his own nephew who is a member of a joint Hindu family with him is one of the vendees under this sale deed.

It has further found it impossible to believe that when the sale was advertised in the whole village, and a large number of villagers took steps to raise large sums of money in order to acquire the property, the plaintiff remained uninformed as he professed to be. On these findings it has held that the plaintiff's claim for pre-emption is barred by estoppel.

There can be no doubt that having regard to the findings arrived at, there is a clear estoppel against the plaintiff. Having himself taken an active part in procuring the sale deed covering the property in dispute, he cannot now turn round and claim that he has a right of pre-emption left.

The learned vakil for the appellant, however, argues that no question of estoppel can arise in this

case inasmuch as no notice, as contemplated by section 14 of the new Pre-emption Act, was given to the plaintiff. His contention is that under the new Act, unless a notice has been issued, a co-sharer's right of pre-emption can never be extinguished, no matter how much estoppel there may be against him. With this contention we are wholly unable to agree. Section 14 is only permissive, which gives a co-sharer a power to give notice by registered post to all persons having a right of pre-emption. In case such a notice is issued the right of such other co-sharers is extinguished. But sections 14 and 15 do not quite mean that in no other case can a co-sharer be estopped from claiming his right of pre-emption. If by his conduct he has led the vendee to believe that he has waived his right of pre-emption, then the estoppel would remain against him, even though under the circumstances it was not thought at all necessary to issue a notice to him.

The appeal has no force and is dismissed.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Walsh and Mr. Justice Dalal.

SHANKAR BAN (APPLICANT) *v.* RAM DEI AND OTHERS
(OPPOSITE PARTIES).*

1925
March, 12.

Civil Procedure Code, section 115—Order rejecting an application to sue in formâ pauperis—Revision.

No revision lies from an order rejecting an application to sue in formâ pauperis. *Buddhu Lal v. Mewa Ram* (1), and *Mahadeo Sahai v. The Secretary of State for India in Council* (2), followed.

* Civil Revision No. 66 of 1925.

(1) (1921) I.L.R., 43 All., 564. (2) (1921) I.L.R., 44 All., 248.

1926

SHANKAR
BAN
v.
RAM DEB.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Shiva Prasad Sinha* and Munshi *Janki Prasad*, for the applicant.

Pandit *Rama Kant Malaviya*, Munshi *Sheo Dihal Sinha*, Pandit *Kashi Narain Malaviya* and Pandit *Debi Prasad Malaviya*, for the opposite party.

WALSH and DALAL, JJ.:—In this case the applicant in revision has been refused leave to sue as a pauper, and he applies to this Court to review that order in revision. In our opinion we have no power to do so. The refusal of leave to sue as a pauper does not determine anything in the suit. It is merely the decision of a preliminary issue arising in or anterior to the suit. It determines nothing except that the plaintiff cannot sue as a pauper. He can sue in the ordinary way like anybody else, and to my mind the case is indistinguishable from the case of *Buddhu Lal v. Mewa Ram* (1), in which a Full Bench of this Court finally endeavoured to set at rest a point upon which there had been considerable controversy. The question there was whether a preliminary issue on a question of jurisdiction was a case decided within the meaning of section 115. That issue, if decided in the negative, determined the proceedings in that court. But it is after all only a preliminary issue arising in a suit. Although the plaintiff cannot, after the determination of that issue, sue in that court, he can still sue in the proper court which has jurisdiction. If the decision of an issue that the court has no jurisdiction is not a case decided, we are unable to see how it is possible to hold that the decision of a preliminary issue that the plaintiff is, or is not, a

(1) (1921) I.L.R., 48 All., 564.

1926

SHANKAR
BAN
v.
RAM DEH.

pauper, is a case decided. The only authority of any weight, in which this matter is reported, is the case of *The Secretary of State for India in Council v. Jillo* (1), decided by three Judges, the then Acting CHIEF JUSTICE, and BANERJI, J. and BURKITT, J. Nothing is said in the head-note about revision, but the Court held that no appeal lay from an order rejecting an application for leave to sue *in formâ pauperis*, and they dismissed the appeal. They then entertained the matter of their own motion in revision, saying "the order passed by the Subordinate Judge is so extraordinary that we direct this case to be treated as a case in revision," and they appointed a further date for argument, and after allowing the other party to be heard, they quashed the order in revision. The report and the head-note are alike somewhat difficult to follow, probably due to the confusion arising from the procedure of the Subordinate Judge. What does appear to be clear is that, although the pauper's application was rejected, the Secretary of State, who had resisted it, was refused his costs. In revision the High Court passed an order directing the application to sue *in formâ pauperis* to be dismissed with costs, giving the Secretary of State his costs against the applicant. The point about a "case" was not argued. It was assumed to be a case. On the other hand, in the case of *Muhammad Ayub v. Muhammad Mahmud* (2), a Divisional Bench held that revision did not lie from an order granting leave to sue as a pauper. The subtle distinction relied upon is clearly set out. Mr. Justice CHAMIER says:—

"It seems to be quite clear that the "case" must have been decided before the High Court can

(1) (1898) I.L.R., 21 All., 139.

(2) (1910) I.L.R., 32 All., 623

1926

SHANKAR
BAN
v.
RAM DEB.

interfere in revision. But giving the word "case" the widest meaning, I am unable to hold that the order against which this application for revision is presented decided any "case." It appears to me that there is a clear distinction between the case of an application for permission to sue or appeal *in forma pauperis* being dismissed or rejected, and the case in which a similar application is allowed. In the former it may be said that the "case" had been decided, while in the latter the order appears to be merely interlocutory."

We are unable to accept this subtle distinction, and it seems to us that on principle the whole controversy is set at rest by the decision of the Full Bench. We agree with what was said in the case of *Mahadeo Sahai v. The Secretary of State for India in Council* (1), though it was only a dictum, and as this application definitely raises the principle, we hold that no revision lies, and that this application must be dismissed with costs.

Application dismissed.

REVISIONAL CRIMINAL.

1926

March, 15.

Before Mr. Justice Daniels.

EMPEROR v. DEOKI KOERI.*

Criminal Procedure Code, section 403—Previous conviction—First conviction under section 379 of the Indian Penal Code—Second conviction under section 9 of the Indian Opium Act, 1878.

Held that a conviction of theft under section 379 of the Indian Penal Code in respect of a certain amount of crude opium is no bar to a subsequent trial and conviction of the convict under section 9 of the Indian Opium Act, 1878.

* Criminal Reference No. 145 of 1926.

(1) (1921) I.L.R., 44 All., 248.

THE facts of this case sufficiently appear from the judgement under report.

The parties were not represented.

DANIELS, J.—The learned Sessions Judge has referred this case on the ground that the accused cannot be tried for an offence of illicit possession of opium under section 9 of the Opium Act because he has been previously convicted of theft under the Indian Penal Code in respect of the same opium. The learned Sessions Judge has misunderstood the provisions of section 403 of the Code of Criminal Procedure. The facts necessary to support a conviction for theft are by no means the same as the facts which have to be proved in a trial under section 9 of the Opium Act. For an offence under section 379 the essential facts to be proved were that the gunny bags in which the opium was found belonged to some one else and that they were removed by the accused dishonestly without the owner's consent. For a conviction under section 9 of the Opium Act the essential facts to be proved are that the accused was in possession of the opium and that the opium was crude opium which the accused could not lawfully have in his possession. Section 403 (2) permits a separate trial for a distinct offence of which a charge might have been framed under section 235, sub-section (1) as having been committed in the course of the same transaction. I cannot, therefore, accept this reference.

Let the record be returned.

Reference not accepted.

1926

EMPEROR

D.

DEOKI

KOERI.

APPELLATE CIVIL.

1926
March, 16.

Before Mr. Justice Mukerji and Mr. Justice Boys.

THE COLLECTOR OF BAREILLY (OPPOSITE PARTY) v.
SULTAN AHMAD KHAN (OBJECTOR).*

Act No. I of 1894 (Land Acquisition Act), section 23, subsection (2)—Method of assessment of valuation—Revenue-free land—"Land"—Trees—Wells.

Held (1) that 40 years' purchase was not too high a valuation for perpetual revenue-free land in the district of Bareilly, and (2) that the 15 per cent. allowable under subsection (2) of section 23 of the Land Acquisition Act, 1924, is to be calculated on the value of the trees and wells as well as of the land on which they stand. *Krishna Bai v. The Secretary of State for India in Council* (1) and *Sub-Collector of Godavari v. Seragam Subbaroyadu* (2), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. G. W. Dillon, for the appellant.

Maulvi Mukhtar Ahmad and Maulvi Muhammad Abdul Aziz, for the respondent.

MUKERJI, J.—This is an appeal by the Collector of Bareilly in a land acquisition case. The land acquired was a perpetual revenue-free land, and one of the questions raised was at how many years' purchase the value should be assessed. The profits found were Rs. 42 a year and the learned District Judge allowed forty years' purchase.

The first ground of appeal is that this is too much. We are of opinion that it is not and we are fortified in our view by the judgement of this Court delivered by another Bench in the connected appeal No. 430 of 1922.

* First Appeal No. 431 of 1922, from a decree of H. N. Wright, District Judge of Bareilly, dated the 24th of June, 1922.

(1) (1920) I.L.R., 42 All., 555.

(2) (1906) I.L.R., 30 Mad., 151.

The next point argued is that the 15 per cent. awarded by the learned District Judge should not have been awarded on the value of trees. It is argued that under section 23, sub-section (2) of the Land Acquisition Act the 15 per cent. is to be awarded on the market value of the land. But under the definition of the land as given in the Act itself the land would include trees standing thereon. We therefore do not see why the value of the trees should be excluded in calculating the 15 per cent. allowed by the statute. This view of ours is supported by *Krishna Bai v. The Secretary of State for India in Council* (1), and *Sub-Collector of Godavari v. Seragam Subbaroyadu* (2). We may point out that what is awarded under clause 2 of sub-section (2) of section 23 is not the value of trees but compensation for the taking away of trees. This means that in addition to the present market value of the land and trees to be awarded by the Collector, he has to award something for the potential value of the trees taken away. It is on this potential value that the 15 per cent. is not to be allowed. We have not got before us any figure which shows that anything has been awarded for the potential value of trees. We understand that the figure that is awarded for the trees is the present market value of them.

1926
THE
COLLECTOR
OF
BAREILLY
v.
SULTAN
AHMAD
KHAN.

Mukerji, J.

The next point urged is that the 15 per cent. compensation for a compulsory acquisition should not have been awarded for the wells. We take it that the wells go with the land and therefore the value of the wells should be added to the value of the land, as apart from the wells. In this view the 15 per cent. should be allowed for wells as well. The Judge was therefore right in calculating the 15 per cent. on the

(1) (1920) I.L.R., 42 All., 555.

(2) (1906) I.L.R., 30 Mad., 151.

1926

THE
COLLECTOR
OF
BARRILLY
v.
SULTAN
AHMAD
KHAN.

entire value of the three figures shown at page 6 of the printed record.

Boys, J.—It appears to me that the unfounded contentions raised here for the Crown that the learned District Judge had allowed 15 per cent. twice over on the wells and should not have allowed it at all on the trees have only been rendered possible by the way in which the account has been stated in the order of the learned District Judge.

“ Land ” as defined in section 3 (a) of the Land Acquisition Act includes wells and trees, etc., and if one total market value is shown for it as provided for by section 23, item “ *first*, ” i.e., “ market value of land under section 23, item “ *first*, ” Act I of 1894, ” with separate items going to make the total, i.e., “ land under section 20, Circular I-A-VIII; ” “ wells under section 24 ditto; ” “ trees under section 98 ditto, ” etc., no confusion can arise and much of the time of this Court would have been saved, for it would have been impossible to raise the contentions with which we have had to deal.

“ Damage ”, if any, for taking trees under section 23, item “ *second*, ” would similarly appear as an item altogether independent of the market value of the land and of the “ value ” of the trees as part of the market value of the land.

BY THE COURT.—The result is that the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh and Mr. Justice Dalal.

1926
March, 16.

EMPEROR *v.* BHAGWAT SINGH AND OTHERS.*

Criminal Procedure Code, sections 107 and 406—Security to keep the peace—Appeal—Competence of appellate court to direct a re-trial.

Held that it is competent to a court hearing an appeal in a case under section 107 of the Code of Criminal Procedure to direct that the case before him be re-tried.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Ambika Prasad Pandey*, for the applicants.

The Assistant Government Advocate (*Dr. M. Walliullah*), for the Crown.

WALSH and DALAL, JJ. :—This revision has been referred to a Bench of two Judges by a learned Judge of this Court for decision as to the powers of an appellate court under section 406 of the Code of Criminal Procedure. The applicants were bound over by a magistrate of the first class of Benares to keep the peace. They appealed to the court of sessions which directed that the order binding over the applicants should be reversed and that there should be a re-trial. The question is whether the appellate court has the power under section 423 of the Code of Criminal Procedure to order a re-trial. The authority given to an appellate court is contained in clauses (c) and (d). In an appeal from an order

* Criminal Revision No. 69 of 1926, from an order of K. A. H. Sams. Sessions Judge of Benares, dated the 23rd of December, 1925.

1926

EMPEROR
v.
BHAGWAT
SINGH.

the appellate court may alter or reverse such order and may make any amendment or any consequential or incidental order that may be just or proper. Under clause (b) in an appeal from a conviction the appellate court is specifically given the power of ordering a re-trial. The distinction exists for a very obvious reason. Under section 403 a person once convicted or acquitted cannot be tried for the same offence and in an appeal from a conviction, if the conviction is reversed, the appellant may claim that he has been acquitted and he would not be liable to re-trial for the same offence. To obviate this difficulty power has to be given to the appellate court specifically to order a re-trial. This difficulty will not arise in proceedings taken under section 107 of the Code of Criminal Procedure. A person bound over under the terms of that section is not convicted of any offence and may be re-tried in pursuance of the same order passed under section 107. The order for re-trial is, in our opinion, an incidental order. All that the Sessions Judge has done is to reverse the order binding over the applicants and then to direct that proceedings subsequent to the stage of the issue of a notice under section 107 be all cancelled and that the Magistrate do proceed from the stage of the issue of notice.

It was argued by the applicants' learned counsel that the Sessions Judge has no power to issue notice to persons to show cause why they should not be bound over to keep the peace. In the present case the Sessions Judge does not issue any such notice. What he has done is to cancel proceedings subsequent to the stage of the issue of the notice and the notice to the applicant issued by the Magistrate is maintained. There will be no necessity of issuing fresh notice to the applicant. We are of opinion that the order passed by the lower court of re-hearing of the notice

issued under section 107 is an incidental order following on the reversal of the order binding over the applicant.

We dismiss this application in revision.

Application rejected.

1926

EMPEROR
v.
BHAGWAT
SINGH.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Dalal.

PREM BIHARI LAL (OBJECTOR) v. MESSRS S. B. BILIMORIA AND CO. (APPLICANT).*

1926
April, 8.

Act No. VII of 1913 (Indian Companies' Act of 1913) section 104—Company—Allotment of shares to transferor of private business as part consideration for transfer—No payment in cash—Liquidation—Question of liability of allottee.

A person who was transferring what had previously been his own private business to a newly formed company received as part consideration an allotment of three thousand fully paid up ordinary shares in the company. No money actually passed, but the transaction was mentioned in the memorandum of association and in the company's prospectus, and the memorandum was signed by the transferor with the consent of the directors on the understanding that nothing was to be paid, in cash, for the shares. No agreement was filed under section 104 of the Indian Companies Act, 1913, nor was there any evidence as to the actual value of the property transferred. The company went into liquidation.

Held that the transaction as set forth above was perfectly legal and the person in whose name the said shares were entered was a share-holder with fully paid up shares, and not a contributory. *In re Macdonald Sons and Co.*, (1) and *In re Barrow-in-Furness Investment Co.*, (2), referred to.

The facts of this case are fully stated in the judgement of WALSH, J

* First Appeal No. 160 of 1925, from an order of M. F. P. Herchenroder, District Judge of Cawnpore, dated the 30th of September, 1925.

(1) (1894) 1 Ch., 89.

(2) (1880) 14 Ch. D., 400.

1926

PREM
BEHARI
LAL

v.

MESSRS.
S. B. BILLI-
MORIA
AND Co.

Dr. Kailas Nath Katju (with him Munshi Narain Prasad Ashthana) and Munshi Shiva Prasad Sinha, for the appellant.

Maulvi Iqbal Ahmad, for the respondents.

WALSH, J.—This is an appeal from an order made by the District Judge, in the exercise of his original jurisdiction, under section 215 of the Companies Act of 1913, in the voluntary liquidation of Shandell Brothers and Company, Limited, Cawnpore, at the instance of the liquidators, Messrs. Billimoria and Co., holding one Prem Behari Lal, who is really Shandell Brothers and the original vendor to the Company, liable for the sum of Rs. 30,000.

The application is that the appellant, Prem Behari Lal, having been a signatory to the memorandum of association to the extent of three thousand shares of the face value of Rs. 10 each, was liable as a contributory in the sum of Rs. 30,000, the said shares being unpaid.

The facts relating to the Company, which are material to the question we have to decide, are as follows:—The Company was formed for the purpose of developing and conducting leather business and installing an up-to-date factory for boots and shoes in Cawnpore, and to take over the business of Shandell Bros., which had, no doubt, like all leather business in Cawnpore and other parts of India, been carrying on satisfactory trade and making large profits during the war. The Company was registered on the 10th of January, 1921, and a prospectus and a memorandum of association prepared and printed in one document, consisting of two separate parts and dated 10th of January, 1921, was issued to the public. At the foot of the memorandum of association Prem Behari Lal, describing himself

as the representative of N. B. Shandell Bros., Cawnpore, agreed to take three thousand shares set opposite his name, in the capital of the Company. In the description of the nominal capital of the Company, contained at the head of the prospectus, it was announced that three thousand ordinary shares of a nominal value of Rs. 30,000 would be allotted as fully paid to the vendor. There cannot be the slightest doubt that the three thousand shares, for which Prem Bihari Lal signed the memorandum of association, are the same three thousand shares which had been agreed should be allotted to him as fully paid, and as part of the consideration for the transfer of the property and good will of Shandell Brothers to the new Company. It is not suggested that the statement of the transfer by Shandell Brothers to the Company in the floatation of the new Company is incorrectly set out in the prospectus, and it appears that it had been agreed, prior to the formation of the Company, that for various considerations, which are described in language which resembles rather an attempt at literary composition than the ordinary language of a business document, "the spirit of sacrifice involved in surrendering their going concern and in view of the services rendered by them prior to the formation of the Company." This is a novel and somewhat hyperbolic, but not an inaccurate, statement of the sale of a good will of a going concern, for which the sum of Rs. 60,000 was to be paid in cash, while the further payment of three thousand ordinary shares fully paid was to be made for the machinery, tools, plant, furniture, as recorded in the schedule attached to the agreement of purchase. We have not had the advantage of seeing the sale-deed. The original is alleged to have been lost, but a copy or a draft has been filed in the lower court in connection

1926

PREM
BIHARI
LAL
v.MESSRS.
S. B. BILIMORIA
AND Co.

Walsh, J.

1926

PREM
BEHARI
LAL
v.
MESSRS.
S. B. BILL-
MORIA
AND CO.

Walsh, J.

with one or other of the various cases which have arisen out of this matter. It is dated the 19th of June, 1922, and it is common ground that the statement which we have quoted from the prospectus accurately represents the operative part of it. On the 22nd of August, 1922, a meeting of the Board of Directors was held and the following resolution was passed. (It should be noted that on the 6th of May, 1921, a resolution had been passed agreeing to allot to Shandell Bros. three thousand fully paid shares and asking Shandell Bros. to execute the sale-deed.)

“Resolution 5. Read the sale-deed of Messrs. N. B. Shandell and Bros., dated the 19th of June, 1922, together with schedule of tools, plants, furniture, machinery, etc.

(a) Resolved that shares of the nominal value of Rs. 30,000 be allotted to them as fully paid up after allotting to other purchasers as detailed in the schedule attached.

(b) Resolved further that Mr. I. B. Chatterji and Khan Bahadur Hafiz Muhammad Halim Saheb be deputed to verify the articles mentioned in the schedule with the stock book.”

There can be no doubt that these are the three thousand shares referred to in the prospectus for which Prem Behari had signed the memorandum of association agreeing to take three thousand shares. No other block of three thousand shares has been suggested with which the three thousand shares for which the memorandum of association was signed, can be identified. Shandell Bros. were at some date, which is not now ascertainable, entered in the register of share-holders as having been allotted three thousand shares, Nos. 6553 to 9552. It is quite clear that these three thousand shares were allotted to Shandell

Bros. in pursuance of the agreement and sale-deed. It is quite certain that they were allotted as fully paid and that no money has been paid in respect of them. The learned Judge held that there had been no allotment. We are unable to agree with him. His view is that there was an agreement to take the shares which had never been performed, and that on this footing the liquidator was entitled to enforce the performance in the course of the liquidation.

1926

PREM
BIHARI
LAL

v.

MESSRS
S. B. BILL-
MORIA
AND Co.

Walsh, J.

Under the old law, both in England and in India, expressed in India by section 28 of the Companies Act of 1882, these three thousand shares would undoubtedly be held by Prem Behari, subject to the payment of the whole amount thereof in cash; and it is apparently upon the supposition that this is now the law, that this application was made and has been persisted in before us. This is borne out by the reference in the learned Judge's judgement to cases decided in England when section 25 of the English Companies Act of 1867 was the law. Section 25 of the English Act and section 28 of the Indian Companies Act of 1882 have been repealed, and there is no similar provision in the Indian Companies Act of 1913. In fact, in this case, no agreement with reference to the issue of these fully paid shares was filed in accordance with the provisions of section 104, and the learned Judge has, on that account, treated the issue of fully paid shares as invalid. But the only consequence of a failure to file the agreement is the penalty provided by sub-section (3) of section 104, and it is no longer the law that the allottee, in the absence of a due filing of the contract, is responsible as a contributory for calls as though the shares were unpaid shares. This is fatal to the application which has been based from the first, and decided by

1926
PREM
BIHARI
LAL
v.
MESSRS
S. B. BILL-
MORIA
AND Co.

the learned Judge, on a misapprehension of the law. The learned Judge took great trouble over the case and was obviously impressed with the equity in favour of Prem Behari, and he set off against the liability of Rs. 30,000, which he decided had been established against Prem Behari, an admission of the value of the goods received by the Company from Prem Behari under the sale-deed, namely, an amount of Rs. 7,000. It is not necessary to go into that matter. The view pressed upon us on behalf of the liquidator, so far as we could understand it about this, was that Prem Behari's conduct had been vitiated by fraud; the Company had never had a *quid pro quo* for the purchase of the material valued at Rs. 30,000; that they had cancelled the transaction entirely, and that Prem Behari was not entitled to any set-off or equity except the remains of the assets originally transferred, which happen still to exist in the premises of the Company after the expiration of four years, after certain sales which have been made either by the Company or by the liquidator. We find it difficult to deal with this point, which, in our view, does not arise. But in any case section 64 of the Indian Contract Act, if the matter is to be treated as one of contract, appears to afford a complete answer to it.

The result is that the appeal succeeds and the application must be dismissed. The appellant is entitled to costs, but having regard to the idle contention raised by him that Prem Behari Lal was a different person from Shandell Bros., we deprive him of one-third costs and direct the liquidator to pay two-thirds of the costs of this appeal and of the proceedings in the court below.

DALAL, J.—I agree with the order proposed. Prem Behari Lal (who really means Shandell Bros.

in his own person) never had any intention of purchasing three thousand shares on payment in cash. Along with the memorandum of association was prepared and filed with the Registrar of Joint Stock Companies a prospectus of the Company, now in liquidation, in which it was definitely stated that three thousand ordinary shares of the nominal value of Rs. 30,000 will be allotted as fully paid to the vendor, Prem Behari Lal. He signed the memorandum of association on this understanding.

If the allotment was made, it must have been of fully paid shares. If no allotment was made, or at first made and subsequently cancelled, Prem Behari Lal could not be held bound by his signature on the memorandum of association, when he, by the consent of the other Directors and to the public knowledge signed it on the understanding that he had to pay nothing for the shares. See *In re Macdonald Sons & Co.* (1). Such an arrangement could possibly have been barred by a provision like that of section 28 of the Companies Act of 1882, as the agreement between Prem Behari Lal and the Company was not filed with the Registrar. As the present Act of 1913 contains no such provision, the operation of such an agreement is not barred.

Even under section 28 of the Indian Companies Act of 1882, I do not think that the present claim would have prevailed. In reality there was payment in cash. Instead of receiving cash for machinery, tools, plant and furniture and then making it over to the Company for the three thousand shares, he received three thousand fully paid shares. They were cross money payments presently enforceable. See *In re Barrow-in-Furness Investment Company.* (2). There are no means of discovering in this case what

1926

PREM
BEHARI
LAL
v.
MESSRS
S. B. BILLI
MORIA
AND CO.

Dalal, J.

(1) (1894) 1 Ch., 89.

(2) (1880) 14 Ch. D., 400.

1926

PREM
BIHARI
LAL
v.
MESSRS
S. B. BILL-
MORIA
AND CO.

the value of Prem Behari Lal's property, consisting of machinery, etc., was. The liquidators have not sued for balance of account. Their case is that the contract of sale was wholly independent of the purchase of the shares. In my opinion this is a totally wrong view of facts. When there is no evidence of inadequate consideration, I hold, for the purposes of this case, that the shares were fully paid up.

Appeal allowed.

REVISIONAL CIVIL.

1926
April, 22.

Before Mr. Justice Walsh and Mr. Justice Dalal.
BADRI PRASAD (OBJECTOR) v. CHOKHE LAL (APPLICANT).*

Civil Procedure Code, section 122; order XXXVIII, rule 5—Ex parte order of attachment prior to judgement—Property attached and entrusted to third person—Permission of court not obtained by attaching officer—Suit subsequently dismissed—Attached property lost—Attaching officer's liability to reimburse the defendant.

On the application of the plaintiff in a suit for the recovery of money the trial court passed an *ex parte* order for the attachment prior to judgement of certain cloths belonging to the defendant and valued at Rs. 910. A vakil of the court was named as attaching officer. He took possession of the property and made it over to one Badri Prasad for safe custody, but without taking the permission of the court to do so. The plaintiff's suit was dismissed, but when Badri Prasad was called upon to produce the defendant's property he failed to do so, and an order was thereupon passed against him for its restoration. *Held* in revision that the responsible person was not Badri Prasad but the attaching officer and an order was passed against him for the refund of the price of the cloth—Rs. 910.

Per WALSH, J.—Cases in which either an attachment or an injunction ought to be issued before judgement are extremely rare. The plaintiff ought to be able to satisfy the

* Civil Revision No. 184 of 1925.

court of the practical certainty of his success, and of the existence of grave danger, and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgement. In England the established practice is never to issue an attachment before judgement under any circumstances without making the applicant give an undertaking to be responsible in damages for any loss in consequence of the exceptional order given to him.

THE facts of this case are fully stated in the judgement of DALAL, J.

Munshi Narain Prasad Ashthana, Munshi Gir-dhari Lal Agarwala and Munshi Baleshwari Prasad, for the applicant.

Dr. Kailas Nath Katju for the opposite party.

DALAL, J.—This matter has arisen out of interlocutory orders passed by a Subordinate Judge without proper attention to the rules dealing with procedure as to attachment prior to judgement. In a suit for recovery of money the plaintiff applied under order XXXVIII, rule 5, for attachment prior to judgement. The court passed an *ex parte* final order of attachment without having any jurisdiction to do so. Under clause 3 of that rule the court is given permission to direct a conditional attachment of the whole or any portion of the defendant's property while proceedings are pending regarding the question as to whether the defendant should furnish security for the claim of the plaintiff or not. After the order of attachment no proceedings, such as are directed in clause 1, were taken by the court. A pleader of the court, Mr. Muhammad Ibrahim, was appointed attaching officer and directed to attach the defendant's cloth of the value of Rs. 910. The cloth was made over to the custody of one Badri Prasad. It appears that Badri Prasad wrote out an undertaking that he would produce this attached property

1926

BADRI
PRASAD
v.
CHOKHE
DAL.

1926

BADRI
PRASAD
v.
CHOKHE
LAL.

Dalal, J.

whenever so directed by the court or by the Commissioner. The Commissioner thereupon made a report to the court stating that he had made over the property to Badri Prasad, and had completed the performance of the task allotted to him. His report is of importance. No permission as to the action taken by him was desired by the Commissioner from the court. Subsequently the suit was dismissed, and the defendant applied that the attachment before judgment may be removed. This application was made under rule 9, order XXXVIII. On this application the Commissioner was directed to make over the property to the defendant, but it appears that the Commissioner was unable to recover it, and he made such a report to the court. The court thereupon called upon Badri Prasad to restore the property, and his defence was that he was not really a custodian on behalf of the court. His defence was not accepted, and a decree for Rs. 910 was passed against him. He came here in revision, and the applicant Chokhe Lal was made a party respondent to the application.

When the application was heard on the 13th of April, 1926, this Bench was of opinion that the Commissioner ought to appear before it and show cause why directions should not be given to him to make good the loss suffered by Chokhe Lal. To-day it was argued on behalf of the Commissioner that this Bench had no jurisdiction to bring the Commissioner on the record as a party. There is no necessity to bring him on the record. He is already an officer of the court, and as such within the jurisdiction of this Court, which appointed him. Under order XXI, rule 43, the attaching officer is bound to keep the property in his own custody, and is held to be responsible for the due custody of that property. He is responsible just as much to this Court as to the court

of trial. [We are, therefore, of opinion that we have authority to pass any order we think appropriate against him under the circumstances of the present case.

1926

BADRI
PRASAD
v.
CHOKHA
LAL.

Under additional rules made by this Court under order XXI (see Book of Rules framed by this Court under section 122 of the Code of Civil Procedure), in rule 123 directions are given as to what is to be done by the attaching officer when the movable property is such as could not be immediately removed from the place where it is attached. In that case under rule 123 the attaching officer shall, subject to the approval of the court, make such arrangements as would be most convenient and economical. In the next rule it is stated that one of the arrangements may be to put one or more persons in special charge of such property, but for that purpose the attaching officer must obtain the permission of the court. In the present case the attaching officer presumably acted under rule 124 when he placed Badri Prasad in special charge of the property, and to make Badri Prasad liable to the jurisdiction of the court, it was necessary for the Commissioner to obtain the permission of the court. No such permission was obtained. As already pointed out, in the report which the Commissioner submitted to the court as to the action he had taken with regard to the commission issued to him, he made no request that permission may be granted to him to place the property in special charge of Badri Prasad. The Commissioner's learned counsel pointed out that when the defendant applied to the court that the custodian had died and some fresh orders should be passed for the safe custody of the property, the court directed the Commissioner to appoint another custodian. The learned counsel desired us to draw

Dalal, J.

1926

BADRI
PRASAD
v.
CHOKHE
LAL.

the conclusion from this order that the court had granted permission to the Commissioner to appoint Badri Prasad in special charge of the property. We cannot agree with this view of the facts of the case. The permission ought to be obtained at the proper time before or immediately after the custodian is appointed, and the presiding officer of the court must bring his mind to bear on the facts of the case and determine whether the person was a proper person or not to remain in charge of the property. In the present case no permission having been obtained, Badri Prasad was not an officer of the court, and the court had no jurisdiction to direct him to refund to the defendant the price of the attached property, which is not forthcoming.

I have purposely refrained from making any observation on the legal relations between the Commissioner and Badri Prasad. These will have to be determined when the Commissioner brings a suit, if any, for the recovery of the property or of its price against Badri Prasad.

In my opinion the Commissioner is, under the circumstances of the present case, the only person liable to the court to produce the attached property, or to pay its price.

I am, therefore, of opinion that the order against Badri Prasad should be discharged, and an order passed against the Commissioner for payment into court of Rs. 910 to reimburse Chokhe Lal for the loss suffered by him by the disappearance of the property.

WALSH, J.—I entirely agree. I am satisfied that on the facts proved before us, it is the only just order which we can make. Where there is a wrong, it has been said, there is always some remedy, and if the defendant in this case had had no remedy, an irreparable injury would have been inflicted upon

him, for no cause whatever, for which he was either legally or morally responsible. But the mere fact that the acts of the court itself have created an irreparable injury upon one of the litigants, is not a sufficient ground for relieving that litigant by inflicting an injury upon another innocent person. So far as I can see, except that Badri Prasad has perhaps done a foolish thing out of either good nature or indolence, he has done nothing in relation to these goods in any way suggesting a shadow of legal or moral responsibility for their loss. And although one is bound to feel sympathy for the vakil who undertook this duty at the invitation of the court below, and although he found himself in a difficult situation, nonetheless he is the person undoubtedly legally responsible.

1926

BADRI
PRASAD
v.
CHOKRI
LAL.

Waish, J.

I am compelled to draw the attention of the learned Judge in the court below to the fact that it is really his conduct which is responsible for the whole of this unfortunate case. From some untoward combination of circumstances it has gone on for four years, a thing in itself suggesting a grave reflection upon the administration of justice, because the whole controversy merely relates to the temporary custody of some cloth, which was not difficult either to identify or to take charge of during the short period of six months which was necessary for dismissing an unsuccessful suit. It is necessary to draw the attention of judges in subordinate courts to certain general principles which the Civil Justice Committee has recently emphasized, and to certain matters of practice and procedure which might be improved upon. There is nothing about which they have spoken so strongly as the reckless issue of *ex parte* orders. Cases in which either an attachment or an injunction ought to be issued before judgement are

1926

BADRI
PRASAD
v.
CHOKHE
LAL.

Walsh, J.

extremely rare. The plaintiff ought to be able to satisfy the court of the practical certainty of his success, and of the existence of grave danger, and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgement. Nothing of the kind existed here, because the defendant succeeded in the suit. It follows, as a matter of course, that if cases in which such orders ought to be made are rare, cases in which they ought to be made *ex parte* are very exceptional. In a case of this kind, as my brother has pointed out, the Code provides the alternative of a conditional order, and even if the Judge had been satisfied that there was any danger at all, he could have got over the difficulty by simply granting an *ex parte* injunction restraining the defendant from selling or alienating in any way the cloth until the question of a further order, or attachment, could be discussed in the presence of the defendant himself. Thirdly, in the very rare cases in which such orders are made in England, the established practice is never to issue it under any circumstances without making the applicant give an undertaking, which has the force of a personal submission to the order of the court, to be responsible in damages for any loss in consequence of the exceptional order which he is seeking. If that had been done in this case no trouble would have arisen, and both Chokhe Lal and the vakil would have been saved from this disaster. I have taken the trouble to compare the provisions of the English law and the Indian law in this matter. The provisions of the Code of Civil Procedure are precisely the same as the rules of the Supreme Court in England. The practice of asking for an undertaking is merely the exercise of a discretion which the court always has under its inherent powers. It enables the court to

avoid an abuse of the process of the court. and to say to the applicant " I will not give you an order unless you undertake to be responsible for any loss resulting from it." The English practice has grown up under which Judges insist upon such an undertaking as part of the terms of the exercise of their discretion. I have made such orders in this High Court. I have never granted an injunction pending an appeal without insisting upon this undertaking, and I see no reason why a similar practice should not grow up in the lower courts.

1926

BADRI
PRASAD
v.
CHOKHE
LAL.

BY THE COURT.—The order of the Court is that the application is allowed, that Muhammad Ibrahim, vakil, is ordered to refund the loss of the goods in the sum of Rs. 910, to Chokhe Lal defendant. Under the circumstances, the misfortune being partly due to the orders of the lower court, we direct all parties to pay their own costs, and we allow Muhammad Ibrahim three months to pay the first half, and another three months to pay the second half of the amount.

Application allowed.

PRIVY COUNCIL.

J.C.*
June, 22.
1926

MASIT ULLAH AND OTHERS (DEFENDANTS) v. DAMODAR PRASAD (PLAINTIFF).

[On Appeal from the High Court at Allahabad.]

Hindu law—Joint family property—Alienation by father—Suit to set aside alienation—Liability for debt of great-grandfather.

A Hindu governed by the Mitakshara is liable for the debt of his great-grandfather in the same manner as he is liable for the debt of his father or grandfather.

The son of a Hindu governed by the Mitakshara sued to set aside a sale for Rs. 18,400, of joint family property by his father, who was made a defendant. It appeared that the whole of the consideration, except about Rs. 2,000, had been applied by the father to discharge mortgages made by his grandfather. There was no evidence that the balance had been used by the father for immoral or unauthorized purposes.

Held that the suit should be dismissed, as the plaintiff was liable for his great-grandfather's debt, and the father, who was in collusion with his son, had deliberately withheld his evidence which would have shown how the rest of the consideration had been applied.

APPEAL (No. 28 of 1925) from a decree of the High Court (June 20, 1922) varying a decree of the Subordinate Judge of Moradabad. The suit was instituted by the respondent to set aside a sale made by his father, Janki Prasad, in 1906 of joint family property for Rs. 18,400. The purchasers, from whom the property was claimed, and Janki Prasad were made defendants. The appellants, the purchasers, pleaded, among other pleas, that the sale was for necessity, and in satisfaction of antecedent debts.

Jawahir Lal, the grandfather of Janki Prasad, had mortgaged the property in 1895 for Rs. 11,000 to Abid Ali Khan; and in 1903 had executed further

* Present: Lord BLANESBURGH, Lord DARLING, Mr. AMEER ALI and Lord SALVESSEN.

1926

MASIT
ULLAH
v.
DAMODAR
PRASAD

mortgages in favour of Sri Ram and Ganeshi Lal. It was concurrently found by both Courts in India that out of the consideration money, Rs. 12,900 was applied to discharge the first of the above mortgages, and Rs. 3,122 to discharge the two mortgages last mentioned, which both Courts found were made for legal necessity.

The decrees made by the Subordinate Judge and by the High Court on appeal appear from the judgement of the Judicial Committee in which the facts are more fully stated. The learned Judges on appeal (MEARS, C. J. and PIGGOTT, J.) were of opinion that the payment of Rs. 12,900 to discharge the mortgage by Jawahir Lal could not be treated as for necessity, as although Janki Prasad was under an obligation to discharge the debt of his grandfather, the plaintiff was not under an obligation to discharge the debt of his great-grandfather.

1926. March, 23. *De Gruyther, K. C.* and *Abdul Majid* for the appellants.

[The respondent did not appear.]

June, 22. The judgement of their Lordships was delivered by Mr. AMEER ALI):—

This appeal arises out of a suit brought by the plaintiff Damodar Prasad on the 19th of September, 1918, to set aside an alienation effected by his father Janki Prasad on the 17th of September, 1906. Damodar Prasad the plaintiff is a member of a Hindu family subject to the Mitakshara law, and the allegations on which he seeks to have the sale by his father set aside are, in the common form, alleged immorality of the father, jointness of the family, and the absence of necessity for the sale which is sought to be set aside. The plaintiff made his father Janki Prasad a defendant in the suit. Originally he was defendant No. 6.

1926

MASTI
ULLAH
v.
DAMODAR
PRASAD.

but, after the addition of the representatives of some of the vendees who had died in the meantime, Janki Prasad was made defendant No. 11.

In his plaint the plaintiff prayed to be put in proprietary possession of the property in suit and for mesne profits. In their answer to the plaintiff's claim the defendants denied that the property was ancestral and they alleged that it was sold to them for Rs. 18,400, which was applied for family purposes, and that the alienation was valid in law and binding on the plaintiff.

The suit came for trial before the Subordinate Judge of Moradabad who, on the 25th of February, 1920, held *inter alia* that the plaintiff had failed to prove absolutely the allegations made by him against his father of immorality; he held also that it had been established that out of the Rs. 18,400 over Rs. 16,000 had been applied to the discharge of ancestral debts, the payment of which was binding on the joint family of which the plaintiff was a member. He held further that Janki Prasad, the grandson of Jawahir Lal who had contracted the debts that had been discharged out of the sale proceeds, was "competent to transfer the family property to discharge his deceased grandfather's debts which were not proved in the case to have been taken for any immoral purposes." He also held that Damodar Prasad, the great-grandson of Jawahir Lal, was burdened with the same obligation that lay upon Janki Prasad. But the Subordinate Judge found that out of the consideration of Rs. 18,400 a sum of Rs. 2,000 odd was not properly accounted for, and that in respect of that amount the plaintiff was under no obligation. He found also that Janki Prasad, on the 9th of July, 1907, transferred his half share in the family property to the plaintiff

1926

MASIT
ULLAH
v.
DAMODAR
PRASAD.

his son for a consideration of Rs. 40,000 and that, although the plaintiff was a minor at the time of this transfer, on attaining majority he ratified the transaction. The Subordinate Judge considered that this transfer had the effect of "disrupting" the joint family and that, after this transfer of 1907, the plaintiff and Janki Prasad could not be taken to be "members of a joint Hindu family owning joint property in the true sense of the word in Hindu law." He accordingly held that the sale deed impugned in the case could not be set aside as the major portion of the consideration was used in the discharge of legal debts. The only relief the plaintiff was entitled to was to have "a proportionate property released from the sale deed and only to the extent of his share." He dismissed the claim for mesne profits considering that the claim was unduly delayed. He accordingly made a decree in the following terms:—"The plaintiff's claim is decreed for recovery of certain specified share in the property in suit."

The plaintiff appealed to the High Court of Allahabad. The learned Judges considered that the decree the Subordinate Judge had made was unworkable, and in this view their Lordships agree; but the High Court took a totally different view regarding the liability of the plaintiff in respect of the ancestral debts for which the property had been alienated by his father Janki Prasad, and principally, in this view of the case, the learned Judges came to the conclusion that Damodar Prasad was not liable for anything more than Rs. 3,077, which was actually left in the hands of the vendees for payment to certain creditors of Jawahir Lal, and which had been proved to have been paid to these men by the vendees. The High Court agreed with the Subordinate Judge in the conclusion that Janki Prasad's transfer of 1907 to his

1926

MASIT
ULLAH
v.DAMODAR
PRASAD.

son effected a partition between them and they accordingly made the following order in the case :—

“ The result is that the plaintiff is entitled to a decree directing that he may recover possession of one-half of the property specified at the foot of the plaint, subject to payment into court for the benefit of the defendant's vendees of a sum of Rs. 1,561-2-6. We allow him two months from the date of this decree to pay that money into court. If he fails to do so, his suit will stand dismissed with costs throughout. If payment is made as directed the plaintiff will be entitled to recover possession. In the view which we take regarding the nature of the suit as a whole, and its conduct in the court below, with reference more particularly to the non-appearance of Janki Prasad in the witness box and the numerous indications on the record that the plaintiff and his father are really hand and glove in this matter, we do not think that we ought to allow the parties any costs. The parties will, therefore, bear their own costs in this Court and in the court below. This decree will be substituted for the decree of the trial court which is hereby set aside. ”

The defendants have appealed from the decree of the High Court to His Majesty in Council.

It is to be regretted that the respondent does not appear on this appeal. Their Lordships, however, have given their best consideration to the case and minutely examined the authorities.

The principal point for determination relates to the position of the great-grandson with regard to the obligation resting in a Mitakshara family on descendants to liquidate the debts of the ancestor.

It is beyond question that under the law of the Mitakshara the great-grandson is as much a member of the joint family as a son or grandson.

It is also clear that the right in ancestral property extends to four generations beginning with the father, and that this right springs from “ birth ”. [the Mitakshara, Chapter I, verse 27; the *Viramitrodaya*

{Shastri's Translation), pp. 16 and 72]. Professor Sarvadhikari in his Lectures on Hindu Law, p. 563, points out that there is absolute consensus among the commentators on the subject of the great-grandson's interest in ancestral property.

1926

MASTI
ULLAH
C.
DAMODAR
PRASAD.

Under the law of the Mitakshara the rights of descendants are co-extensive with their obligations. Sons and grandsons are expressly declared to have controlling rights in respect of ancestral estate. Vijnaneswara in Chapter I, Section I. verse 27, declares as follows :—

“ Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth ; but he is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor.”

In Section V, verse 9, the grandson is declared to have the same right as the son :

“ So likewise the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale of effects inherited from the grandfather ; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependant.”

Their Lordships will consider presently whether there is any difference in principle between the rights and obligations of grandsons and of great-grandsons.

Mr. Mayne, in his valuable treatise on Hindu Law, has summarized the rules of the Mitakshara relating to the rights of sons and other descendants as follows :—“ The question in each case will be ‘ Who are the persons who have taken an interest in the property by birth ? ’ The answer will be that they are

1926

MASIT

ULLAH

v.

DAMODAR
PRASAD.

the persons who offer the funeral cake to the owner of the property. That is to say, the three generations next to the owner in unbroken male descent. Therefore, if a man has living sons, grandsons and great-grandsons, all of these constitute a single co-parcenership with himself. Every one of these descendants is entitled to offer the funeral cake to him and therefore every one of them obtains by birth an interest in his property." And the author then proceeds to add, "the sons of the great-grandsons would not offer the cake and therefore are out of the co-parcenership so long as the common ancestor is alive."

In the case of *Lachman Das v. Khunnu Lal* (1) a Full Bench of the Allahabad High Court have held that on a mortgage by a Hindu, subject to the Mitakshara, of joint ancestral property the sons and grandsons of the mortgagor were equally liable for the interest secured by the mortgage in addition to the principal amount. The learned Judges in that case considered that, although the law of the Mitakshara made a certain distinction in the liability of the son and grandson with regard to ancestral debts, such distinction was not recognized by the British Indian Courts out of the Bombay Presidency. The question of the great-grandson's liability did not form the subject of discussion in that case; the enunciation was, therefore, confined to the obligation of a grandson.

The High Court of Allahabad, in the present case, seems to have thought that the Hindu law did not extend the liability for the payment of ancestral debts beyond the grandson. That conclusion seems to be wrong. The law of the Mitakshara proceeds on a logical basis; rights are created by birth up to the third generation, viz., son, grandson and great-grandson; the son of a grandson is entitled equally with

(1) (1896) I.L.R., 19 All., 26.

1926

MAST
ULLAH
v.
DAMODAR
PRASAD.

his father to question the validity of debts contracted by the ancestor after his birth. His obligation to discharge the valid debts of that ancestor is therefore, co-extensive with the rights. This view is supported, not only by the principle on which the liability of the descendants is based, but by express rules. Mitra Misra (the author of the *Viramitrodaya*) states the rule thus:—"The term 'sonless' used in the text (on succession)—such as 'The wife and the daughters also etc.'—indicated the default of the grandson and the great-grandson also. The succession of the wife is proper only in default of male issue down to the great-grandson. For the duty of the grandsons, too, to pay off the debts is declared in the text, 'The debts ought to be liquidated by the sons and grandsons (*putra-pautrais*); but if any one else were to take the estate in spite of the grandson, then the declaration of the grandson's liability to discharge the debts would be unreasonable, since by reason of the text—'The heir to the estate of a person shall be compelled to liquidate his debts,'—he alone who takes the estate is declared liable to discharge the debts. If it be argued that the grandson is included under the term 'gentiles' and as such may take the estate, then in that case there would be no use for the special provision regarding the grandson's liability to discharge the debts; since it would follow from the text alone, viz.: 'The heir to the estate of a person shall be compelled to liquidate his debts.'—If it be said that the grandsons are liable in the same way as sons to liquidate the debts, although they do not get the grandfather's estate, then *a fortiori* it follows that when property is left by the grandfather, the right of any others than the grandson ought not to take place. The same reason applies to the great-grandson also."

1926

MASIT
ULLAH
v.
DAMODAR
PRASAD.

Then after discussing the meaning of the words *putra-pautrais*, he proceeds thus:—"Accordingly, the different sorts of provisions for the liquidation of the debts by the great-grandsons as distinguished from the same by the grandsons, and by the grandsons as distinguished from the same by the sons, become consistent with reason. Otherwise there would arise the objection of assuming a peculiar provision so far as regards the great-grandsons."

Again Vijñaneswara, commenting on the following enunciation of Yajñavalkya [II, 50 (a)]—"The father being gone to a foreign country or deceased (naturally or civilly) or afflicted with an incurable disease, the sons or their sons must pay his debt, but, if disputed, it must be proved by witnesses,"—states that "Bṛihaspati says: 'The sons must pay the debts of their father when proved as if it were their own (*i.e.*, with interest); the grandson has to pay only the principal, while the great-grandson shall not be compelled to pay anything unless he have assets.'" (1).

The Hindu lawyers appear to have made a difference in the obligations resting upon sons, grandsons and great-grandsons. The son was bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the ancestor. The grandsons had to discharge the debt without interest and the great grandson's liability arose only if he received any assets from the ancestor.

The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, are co-extensive. In the case of *Brij Narain v. Mangal Prasad* (2) the son's liability is expressly laid down, and their Lordships think that

(1) West and Bühler's Hindu Law (3rd Edn.), Vol. II, pp. 1241-1242.

(2) (1923) I.L.R., 46 All. 95; L.R., 51 I.A., 129

that rule extends equally to grandsons and great-grandsons.

1926

MASIT
ULLAH
v.
DAMODAR
PRASAD.

In the present case it is amply proved that in 1901 Jawahir Lal borrowed on a mortgage Rs. 11,000 from one Abid Ali Khan and that in 1903 he similarly borrowed over Rs. 3,000 from certain people of the name of Sri Ram and Ganeshi Lal. Jawahir Lal appears to have died after 1903, and Janki Prasad, his grandson, became manager of the ancestral estate. In 1906 he sold the property now in suit to the defendants for Rs. 18,400. It is established to the satisfaction of both the Courts in India that out of the consideration for the sale Rs. 3,000 odd went to the discharge of the debts due to Sri Ram and Ganeshi Lal. The Subordinate Judge has found on the evidence that a large portion of the said consideration amounting to Rs. 12,700 was applied by Janki Prasad to the discharge of the debt due to Abid Ali Khan. A certain balance was left outstanding and the mortgagee brought a suit against Janki Prasad and Damodar Prasad, the plaintiff, for the balance. The plaint in that suit is Exhibit E. It states that "Rs. 3,072-13-0, principal and Rs. 935-3-0, interest, in all Rs. 4,008 was still due to the plaintiffs from the defendants and the property mortgaged, after deducting Rs. 12,700 which the plaintiff had received." It goes on to state further that "about six years ago, Lala Jawahir Lal, the principal mortgagor, died. Defendant No. 1 is his grandson, and defendant No. 2 his great-grandson; and the family of all the above-mentioned three men was a joint Hindu family, and debt was contracted for family necessity. Now the defendants are in possession of the hypothecated property and liable for payment of the debt."

1926

MASIT
ULLAH
v.
DAMODAR
PRASAD.

On this claim a decree was made against Janki Prasad and Damodar Prasad for the sum of Rs. 4,614, and, on the 14th of July, 1914, Janki Prasad put in an application depositing that amount.

Counsel for the appellants was quite justified in laying stress on this application as showing that Janki Prasad and Damodar Prasad never questioned in that suit the legality of the mortgage to Abid Ali Khan and accepted the full benefit of the discharge of Abid Ali Khan's mortgage.

Their Lordships are of opinion that the view taken by the High Court regarding the obligation of the great-grandson to pay the debt of the ancestor is not well-founded in law. In this case the recognized obligation resting on the grandson was accepted by Janki Prasad. He had discharged the debt, which he was bound to do, and, in their Lordships' opinion, his son could not turn round to say that it had been invalidly discharged. Their Lordships are of opinion that it has been amply proved in this case that the sum of Rs. 12,700 was applied to the payment of Abid Ali Khan's mortgage.

The only sum that was left unaccounted for was Rs. 2,000 odd, as found by the Subordinate Judge. Janki Prasad, the plaintiff's father, admittedly, received the whole consideration, and he was the man who used the largest part of the money for the discharge of the ancestral debts. He could have told in his evidence how the sum of Rs. 2,000 was applied. There is no evidence that it was used for immoral or unauthorized purposes. His testimony was therefore most material in the case. Efforts were made to get him into the witness box, but he studiously avoided appearing in court. The Subordinate Judge says father and son were living together at the time, and he

surmised that he was in collusion with his son. In this view the learned Judges of the High Court appear to agree. Their Lordships have no doubt on the facts that the present action is a collusive one, that the testimony of Janki Prasad as to the application of the balance of Rs. 2,000 was deliberately withheld, and that the transfer in 1907 by the father to the son was equally collusive.

In their Lordships' judgement, the ruling in *Vadivelam Pillai v. Natesam Pillai* (1) does not apply to the facts of this case.

On the whole case, their Lordships are of opinion that the judgement and decree of the High Court should be set aside and the plaintiff's suit dismissed with costs in all the Courts, and they will humbly advise His Majesty accordingly. The respondents will pay the costs of this appeal.

Solicitor for appellants : *H. S. L. Polak.*

NIRMAN SINGH AND OTHERS (PLAINTIFFS) v. LAL RUDRA PARTAB NARAIN SINGH AND OTHERS (DEFENDANTS).*

J.C.*
July, 1.
1926

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Act No. IX of 1908 (*Indian Limitation Act*) schedule I, article 127—*Suit for partition—Exclusion from joint family property—Mutation proceedings—Absence of judicial determination of title—Receipt of maintenance.*

In 1882, on the death of a Hindu leaving three sons, mutation proceedings took place in which the eldest son contended that he was entitled to be recorded as sole owner. An order was made that he be recorded as lambardar, and on appeal an entry of his younger brothers as co-sharers was

* Present : Viscount DUNEDIN, Lord ATKINSON, and Mr. AMER ALL.
(1) (1912) I.L.R., 37 Mad., 435.

1926
NIRMAN
SINGH
v.
LAL RUDRA
PARTAB
NARAIN
SINGH.

cancelled. The younger brothers lived jointly with the eldest until 1911; after that date they lived separately, receiving maintenance, paid and accepted in the belief that the property was impartible. In 1917 the youngest brother sued for partition. It was found concurrently that the property was joint and that there was no custom of impartibility or primogeniture.

Held that the plaintiff had not been excluded from the joint family property within the meaning of the Indian Limitation Act, 1908, schedule I, article 127, and that consequently the suit was not barred under that article. In article 127 "excluded" means totally excluded.

It is well established that an order made in mutation proceedings is not a judicial determination of title or proprietary interest.

Judgement of the court of the Judicial Commissioner reversed.

APPEAL (No. 23 of 1924) from a decree of the Court of the Judicial Commissioner of Oudh (September 22, 1922) reversing a decree of the Subordinate Judge of Bahraich (July 6, 1920).

The suit was brought in 1917 by the appellants against the respondents for partition.

Both Courts in India held that the property was joint and that it was not governed, as was pleaded, by a custom of impartibility and primogeniture.

The sole question on the appeal was whether the suit was barred by the Indian Limitation Act, 1908, schedule I, article 127. The Subordinate Judge held that it was not, but on appeal to the Court of the Judicial Commissioner it was held that the suit was barred.

The facts, and the terms of article 127, appear from the judgement of the Judicial Committee.

1926. May 18, 20. *DeGruyther*, K. C. and *Dube* for the appellants.

[The respondents did not appear.]

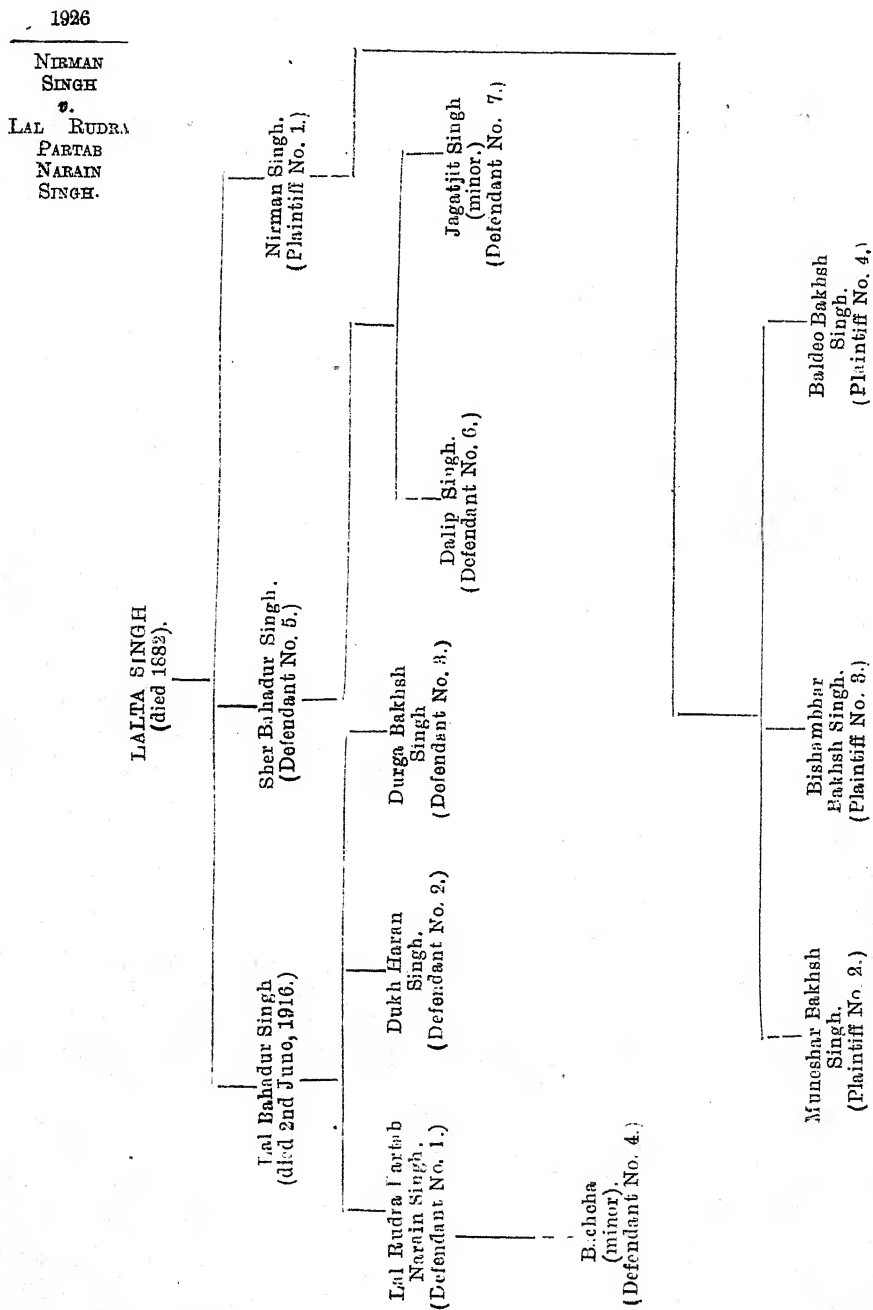
July, 1. The judgement of their Lordships was delivered by Lord ATKINSON :—

1926
NIRMAN
SINGH
v.
LAL RUDRA
PARTAB
NARAIN
SINGH.

This is an appeal from a judgement and decree dated the 18th of September, 1922, of the Court of the Judicial Commissioner of Oudh which reversed a judgement and decree dated the 6th of July, 1920, of the Subordinate Judge of Bahraich. The main question for determination on this appeal is whether the plaintiffs' suit is barred by limitation. The Subordinate Judge held that it was not barred, and the Appellate Court took the opposite view, holding that it was barred.

The pedigree of the parties showing their descent from Lalta Singh, who died in the year 1882, the relation between them, and the position they have respectively taken up in the litigation out of which this appeal has arisen, are indicated with sufficient fullness and accuracy in the pedigree as set out in the appellants' case.

It runs as follows :



The pedigree of the ancestors of Lalta Singh is fully printed at page 29 of the record.

The plaintiffs, Nirman Singh, Muneshar Bakhsh Singh, Bishambhar Bakhsh Singh and Baldeo Bakhsh Singh commenced a suit against the three sons of Lal Bahadur Singh, since deceased, (he died on the 2nd of June, 1916), and Bachcha (then 10 years of age, a minor under the guardianship of his own father), Sher Bahadur Singh, and Dalip Singh. A paragraph of the plaint filed by the plaintiffs sets forth that the parties to the suit are members of a joint Hindu family, governed by Mitakshara law, and that no partition of any kind has ever been effected between the parties to the suit, or between the ancestors mentioned in their pedigree. In paragraph 3 it stated that Lalta Singh's own brothers died childless; that Lalta Singh thereupon became head of the joint Hindu family and entered into possession of the entire joint property; that at the time of the death of Lalta Singh, Nirman Singh, plaintiff No. 1, and his brother, Sher Bahadur Singh, were minors and lived with their elder brother, Lal Bahadur Singh; that all the villages held in proprietary possession remained joint property, mutation of names being effected in favour of Lal Bahadur Singh as the head of this joint Hindu family, during whose life all the members of the family remained as owners in respect of the joint family property; that Lal Bahadur Singh died on the 2nd of June, 1916. It was then stated that defendants Nos. 1 to 4 then raised all sorts of disputes and filed objections against the mutation of names, rendering it impossible to live in joint enjoyment of the family property; that, for this reason, plaintiffs then desired this property should be partitioned amongst the members of the family, but on the 27th of November, 1916, defendant No. 1 finally refused to consent to this being

1926

NIRMAN
SINGH

v.

LAL BAHADUR
SINGH
PARTAB
NABAIN
SINGH.

1926

NIRMAN
SINGH
v.
LAL RUDRA
PARTAB
NARAIN
SINGH.

done. The share of the plaintiffs in the entire property would, on partition, be one-third, that of defendants Nos. 1 to 4 also one-third and that of the defendants 5 to 7 also one-third.

Defendant No. 5 and his two sons, defendants Nos. 6 and 7, are impleaded as defendants, but in their written statements they admit the validity of the plaintiffs' claim. The principal defendant is Lal Rudra Partab Narain Singh, defendant No. 1. He filed a written statement on the 3rd of November, 1917, about 18 months after the death of his father. In his statement he denied that the parties to the suit were ever members of a joint Hindu family, and in paragraphs 15 and 16 of this statement averred that the custom of single ownership had been existing for centuries in the family of Lal Rudra Partab Narain Singh, defendant No. 1, and that the Bahraich estate since its acquisition had for generation after generation been held by a single owner, that under this custom the property was impartible and owned by a single owner. That the estate was never partitioned in view of the fact that it was impartible, and further that the custom of primogeniture has obtained in the family of defendant No. 1 and that for generation after generation the Bahraich estate had been held and enjoyed by the eldest son in accordance with this custom, while the other children continued to get only maintenance allowance due by way of *guzara* in accordance with the custom. He further averred that Lal Bahadur Singh, his father, had been in exclusive possession of the estate in dispute from May, 1882, and that even if the plaintiffs had any right to partition, limitation commenced from the date of mutation in 1882, and their claim was barred by time. Defendants 3 and 4 adopted as their own the pleas raised by defendant No. 1.

On these pleadings, the Subordinate Judge framed 20 issues. He has most conveniently divided them into three groups according to the subjects with which they respectively deal.

The first group consists of the following first two issues:—

- “(1) Whether Lal Bahadur Singh and the parties to the suit constitute members of a joint Hindu family?
- “(2) Whether the property in suit is joint family property?”

The Subordinate Judge, after having most carefully examined all the evidence, found in the affirmative on each of these issues, and the Appellate Court affirmed his findings.

The second group has comprised the two following issues, Nos. 3 and 4:—

3. Does a custom of impartibility and of succession by lineal primogeniture exist in the family, as alleged?

4. Is the property in suit also otherwise impartible, as alleged?

The Subordinate Judge found these issues against the defendants, and expressed himself thus:—

“Now all the points to be determined in connection with issue No. 3 have been wholly or partly decided in the negative upon a review of all the authorities cited for the parties and the documentary and oral evidence in the case. I am, therefore, of opinion that the custom of impartibility and lineal primogeniture pleaded by the contesting defendant is not established, and I find issues Nos. 3 and 4 in the negative.”

The Appellate Court concurred with the finding of the Subordinate Judge that the defendants had failed to prove the custom pleaded by them, saying, “Our finding is that the custom is not proved.”

1926
NIRMAN
SINGH
v.
LAL RUDRA
PARTAE
NARAIN
SINGH.

1926

NIRMAN
SINGH
v.LAL RUDRA
PARTAB
NARAIN
SINGH.

The third group consist of the issues Nos. 10, 11 and 12, relating to the plea of limitation. These run as follows :—

“(10) Have the plaintiffs been in possession of the property in suit within limitation?

(11) Have Lal Bahadur Singh and defendant No. 1 been in adverse possession of the property in suit for more than twelve years before suit?

(12) If the property in suit be found to be joint family property. then have the plaintiffs been excluded within their knowledge from the enjoyment of it more than twelve years before suit ?”

The lower Courts are agreed in holding that the determination of the question of limitation depends upon the true meaning and application of article 127 of the first schedule to the Indian Limitation Act (IX of 1908), which is as follows :—

Description of Suit.	Period of Limitation.	Time from which period begins to run.
127. Suit by a person excluded from joint family property, to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to the plaintiff.

The Subordinate Judge tried issues Nos. 10, 11 and 12 together, and, on considering them, he directed his mind to the following considerations :—

“In order to see whether the suit is or is not barred under article 127, we have to see whether or not the plaintiffs were excluded from the joint family property more than twelve years before the suit to their own knowledge. The onus of proving not only that they were excluded, but also that they knew that they were excluded more than twelve years before the suit, *i.e.*, before the 6th of July, 1905, lay upon the contesting defendants.”

The facts relating to the plea of limitation may be summarized thus :—

As already stated, the head of the joint family, Lalta Singh, died in 1882, leaving him surviving

three sons, namely, (1) the eldest, Lal Bahadur Singh; (2) the second, Sher Bahadur Singh (defendant No. 5), who was sixteen years old: and (3) the plaintiff, Nirman Singh, who was a minor, fifteen years of age.

1926
NIRMAN
SINGH
v.
LAL RUDRA
PARTAB
NARAIN
SINGH.

On the 23rd of May, 1882, the said Lal Bahadur Singh filed an application under the provisions of sections 61 and 62 of the Oudh Land Revenue Act (XVII of 1876), praying that, as he had performed the funeral rites of his deceased father, mutation of names in respect of his father's estate might be made in his favour.

The Extra Assistant Commissioner of Bahraich on the 1st of June, 1882, made the following order on this application:—

“ ORDERED

that in place of the name of Lalta Singh, deceased, the name of his eldest son, Lal Bahadur, shall be written in the column of Lambardar) and the names of (the deceased's younger sons, Sher Bahadur Singh and Nirman Singh, shall be written in place of the deceased as co-sharers. Let the Tahsildar be informed so that he gives effect to this and collects the usual fee. Let the Registrar Qanungo, the Suddar Qanungo, the *wasilbaqi nawis* of the Suddar be informed. If this eldest son, Lal Bahadur, has any objection to the recording of the names of his brothers as co-sharers, and considers them to be entitled to maintenance, he can have his remedy from a competent Court, as according to Hindu law and custom all the sons of a deceased person are his lawful representatives.”

Lal Bahadur was dissatisfied with this order and appealed to the Deputy Commissioner of Bahraich, who made the following order:—

ORDER.

“ Such being the facts of the case, I accept the appeal from the order of Extra Assistant Commissioner and cancel so much of his order as not register (*sic*) Sher Bahadur and

1926
 NIRMAN
 SINGH
 v.
 LAL RUDRA
 PARTAB
 NARAIN
 SINGH.

Nirman Singh in the Tahsil Books as proprietors in possession. This order will not, of course, debar them from claiming, should at any time such a course appear to either of them advisable, their share in the estate.

"To-day present, applicant and the two minors. Their mother and guardian is not present. Sher Bahadur and Nirman Singh, aged 16 and 15, appear with an application from their mother excusing her appearance at such a distance (35 m.) in this weather, she being a *pardanashin*. She says in it that the estate has never been divided, and that she has no objection to *dakhil-kharij* in the eldest boy's name, Lal Bahadur's.

"Sher Bahadur, aged 16, declares that the signature to this is his mother's, and was written by her in his presence."

Both the lower Courts have found that the plaintiff, Nirman Singh, and his brother, Sher Bahadur Singh, have since their father's death in the year 1882, lived jointly with their eldest brother Lal Bahadur Singh in the ordinary way, and continued so to do up to the year 1911, or thereabouts. Thereafter they resided separately, but received considerable sums of money for their expenses from Lal Bahadur Singh, the head of the joint family. The defendants themselves assert that plaintiffs are in receipt of cash maintenance, and that they are in possession of some land in lieu of the same. In view of these facts, the Subordinate Judge held that the plaintiffs' suit was not barred by limitation, and concluded a sound and able judgement in the following words:—

"The last-mentioned case of *Raghunath Bali v. Maharaj Bali* (1), makes it clear that even where the person actually holding the property of a joint family believes that it is impartible property, and another member of the family sharing that belief accepts maintenance, it does not amount to the exclusion of the latter, and upholds the authority of the Privy Council in *Rajya Lakshmi Devi v. Surya Narayana* (2).

(1) (1885) I.L.R., 11 Cal., 777.

(2) (1897) I.L.R., 20 Mad., 256; L.R., 24 I.A., 118.

that where the junior members under a mistake accept the provision of maintenance they are not to be deemed excluded as coparceners. The mere fact that the parties believed that the estate was impartible and the junior coparceners having a right to share accepted maintenance in lieu, does not put the head of the family in a position adverse to the other members, so as to force them to realize, so to speak, their right of partition or be barred. The cause of action would not arise unless the coparceners were absolutely excluded, and they are not absolutely excluded if they are in receipt of maintenance from the family property. Here it is asserted by the contesting defendants themselves that the plaintiffs are in receipt of cash maintenance, and that they are in possession of some lands in lieu of the same. The decision of the Madras High Court in *Jaganatha v. Ramabhadra* (1), affirmed by the Privy Council in I. L. R., 14 Madras, 237, laid down that if the plaintiff in a suit under article 127 has lived on the property with other joint owners, and has been supported by the proceeds of the joint family property, this is sufficient to negative his exclusion and to save limitation. Exclusion, to bar a suit under article 127, must be a total exclusion. (*Vide* I. L. R., 20 Madras, 256; 24 Madras, 562; and 52 Indian Cases, 470.) In view of these authorities and the facts of the case, I am of opinion that the plaintiffs have not been excluded within their knowledge from the enjoyment of the property in suit for more than twelve years before the suit and that it is within time. I therefore find the issue accordingly against the contesting defendants."

1926

NIRMAN

SINGH

v.

LAL, RUDRA

PARTAB

NARAIN

SINGH.

The perusal by their Lordships of the judgement of the Court of the Judicial Commissioner of Oudh leads their Lordships to think that its judgement is to a great degree based on the mischievous but persistent error that proceedings for the mutation of names are judicial proceedings in which the title to and the proprietary rights in immovable property are determined. They are nothing of the kind, as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal

(1) (1886) I.L.R., 11 Mad., 330.

1926

NIRMAN
SINGH

v.

LAL RUDRA
PARTAB
NARAIN
SINGH.

inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with the greater confidence that the revenue for it will be paid.

It is little less than a travesty of judicial proceeding to regard the two orders of the Assistant Commissioner of Bahraich and of the Deputy Commissioner as judicial determinations expelling *proprio vigore* any individual from any proprietary right or interest he claims in immovable property. Yet the appellate court said the Deputy Commissioner decided that Lal Bahadur Singh was alone entitled on the evidence to have his name entered, though the Deputy Commissioner had added that his order could not debar the brothers from bringing a suit to establish their claim at any time.

It appears to us that these proceedings afford clear evidence that Lal Bahadur Singh took possession of the estate as property to which he was entitled to exclusive ownership, and not on behalf of the younger brothers. There can be no doubt he had sole physical possession in the sense that he was able to deal with the proceeds, and to exclude all others, and there can be no doubt that he showed a determination to exercise that physical power on his own behalf. He had therefore sole legal possession—yes, in the sense that any person who on an application for mutation of names is put upon the registry as sole occupier will have sole legal possession, whether he be the head of a joint Hindu family, or not head of any family, or an absolute owner. If, however, the appellate Court meant by the language they have used that these orders were evidence that Lal Bahadur

Singh was in possession as sole legal owner in a proprietary sense, to the exclusion of all claims of the other members of the family as co-owners or for maintenance or otherwise, they, in their Lordships' view, were entirely mistaken. After referring to what Lord MACNAGHTEN said in the case of *Corea v. Appuhamy* (1), to the effect that "possession is never considered adverse if it can be referred to a lawful title," they held that there was nothing in that case to show any intention on the part of the deceased owner's heir to enter as a plunderer, and said "That case is to be distinguished from the present case by the fact that Lal Bahadur Singh did at the time of entry set up an adverse title in clear terms before the revenue authorities, and, *they accepted his claim.*" If that means that Lal Bahadur Singh set up a claim to be sole proprietary owner of this estate and entitled to an interest in which his brothers had no claim, then these revenue authorities had no jurisdiction to pronounce upon the validity of such a claim, and from these orders it would appear they did not attempt to do so. It is, in their Lordships' view, perfectly clear that the orders already referred to did not effect and were not intended or designed to effect *proprio vigore* an exclusion of the plaintiffs from all interest in the property of the joint family of which they were members.

The Appellate Court says it was strenuously argued that the fact that Lal Bahadur Singh's brothers got maintenance and actually held some lands was conclusive proof that they were not, in point of fact, excluded from the estates. A long and rather obscure discussion follows as to the exclusion being intentional or the contrary. It is generally understood in law that a man must be presumed to intend the

1926

NIRMAN
SINGH

v.

LAL RUDRA
PABTAB
NABAIN
SINGH.

(1) (1912) A. C. 230.

1926

NIRMAN
SINGH

v.

LAL, RUDRA
PARTAB
NARAIN
SINGH.

natural consequence of his own act. The court said :—

“ It must be possible to infer that it was accompanied by an intention to abandon the position of a right to exclude. No doubt such intention will be inferred where no legal title to exclude is proved to have been set up and maintained, because there is always a presumption in favour of rightful entry and retention. Such presumption is, however, rebuttable. Here the facts are these. Lal Bahadur Singh was, as we have found, a co-sharer in point of law. But he was holding under an express assertion of his title to hold as sole proprietor. He gave money and lands to his brothers in the way a sole proprietor would do. Such gifts do not save his brothers from exclusion. The cases cited to us appear to us no authority for the contrary.”

On the whole matter their Lordships are quite unable to concur with the Appellate Court in the views that Court has taken on all or most of the important points in this case. They think those views are erroneous. The judgement of the Subordinate Judge they, on the contrary, think sound and helpful. They are therefore of opinion that the decision of the Court of the Judicial Commissioner should be set aside, that the judgement and decree of the Subordinate Judge should be affirmed, and this appeal should be allowed with costs. They will humbly advise His Majesty accordingly.

Solicitor for appellant : *H. S. L. Polak.*

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Mr. Justice Lindsay and Mr. Justice Dalal.

IN THE MATTER OF A VAKIL.*

1926
February, 22.

Vakil—Unprofessional conduct—Responsibility of a vakil for signing a document drafted by his senior in the case, or by his clerk.

A vakil who signs his name to a document makes himself thereby in every way as responsible for it as if he was the

* Civil Miscellaneous No. 43 of 1926.

original drafter of it. If it turns out that the document is one that no man acting honestly could in the circumstances have drafted, then he will be bound to answer for every word, line, sentence and paragraph, and it will not be the least defence that somebody else *e.g.*, his senior in the case, wrote it out and he only signed it. Signature implies association and carries responsibility.

If a legal practitioner puts his signature to a document, he will be deemed to have read it and to carry it in his recollection to the extent that an ordinarily competent, careful and reasonable man would carry it, and he will be bound by all the implications arising from it just as much as if he had written every word of it with his own hand. It would be no defence for him to say that his clerk had drafted the document and that he had signed it without reading it.

THE facts out of which this matter arose may be briefly summarized from the judgement as follows:—

Ganjeshri had forged three birth certificates of the sons of Jokhu Lal, the father of some of the defendants in a civil suit. Raghubir Prasad, vakil for the defendants, and Sheo Autar and Deo Narain Pandey were also involved in the conspiracy and had used these documents in court. The suit was dismissed on the strength of these documents.

Subsequently the plaintiffs, being suspicious, made careful and diligent inquiries and inspected the original registers; and on the 17th of December, 1923, they submitted to the court an application for review, which exposed the whole fraud.

In the circumstances it occurred to some one that the position might be alleviated by fresh forgeries and that the issue would be greatly confused if, instead of Jokhu Lal having only four sons, it could be proved that he had a fifth. This forgery was carried out by Ganjeshri, who obtained access to the register of deaths of mauza Patarhat and inserted the death of a son as on the 27th of February, 1905. The forgery having been committed, Ahmad Ashraf,

1923

IN THE
MATTER OF A
VAKIL.

1926
IN THE
MATTER OF A
VAKIL.

another vakil for the defendants, at the request of Raghubir Prasad inspected the register. He reported to Raghubir Prasad that he had discovered the entry of the death. In making this inspection Ahmad Ashraf might have been acting innocently.

On the 3rd of January, 1924, an application was made by Ahmad Ashraf for an adjournment of the review on the ground *inter alia* of Raghubir Prasad's illness and the need for the production of evidence. This evidence was the entry in the death register of Patarhat.

Thereupon Raghubir Prasad drafted a document (Ex. 37) which was the answer to the application for review. The answer opened with an assertion that these documents were genuine copies. This was a falsehood easily and immediately demonstrable on inspection of the registers. Paragraph 3 contained a most offensive charge, entirely without foundation, of possible mal-practice by the plaintiffs in collusion with officials of the copying department or record room. Then came the allegation that besides the four sons a son was born to Jokhu Lal in 1901, who died at a very tender age on the 27th of February, 1905.

On the 10th of January, 1924, this document was sent by Raghubir Prasad to Ahmad Ashraf and he signed it.

Raghubir Prasad, Deo Narain and Sheo Autar were put upon their trial under sections 466 and 193 of the Indian Penal Code and convicted. At the close of the trial, the Sessions Judge called the attention of the High Court to the conduct of Ahmad Ashraf.

Notice was issued to Ahmad Ashraf to show cause why disciplinary action should not be taken against him for having on the 10th of January, 1924,

joined with Raghbir Prasad in filing a petition of reply to an application for review of judgement presented by the plaintiffs, well knowing that the said petition contained false statements and intending fraudulently and dishonestly thereby to defeat the said application. The further charge was in respect of statements made by him on the 24th of September, 1924, in the court of the Committing Magistrate, which were known by him to be untrue, and made with the object of dissociating himself from Raghbir Prasad and the other conspirators.

Dr. *Kailas Nath Katju* (with him Mr. *A. Sanyal*), for the Vakils.

The Government Advocate (*Babu Lalit Mohan Banerji*), for the Crown.

The judgement of the Court (MEARS, C. J., LINDSAY, and DALAL, JJ.) after setting out the facts proceeded as follows :—

We invited Ahmad Ashraf to give us some reasons which would justify his having identified himself with Raghbir Prasad in the answer of the 10th of January.

He could really give no explanation to show that he had any honest belief in the genuineness of the new case set up in paragraph 5 or of the charges of forgery, collusion and fraud made against the plaintiffs and officials in the copying and record departments.

His defence really amounted to this, that he was entitled to sign anything that Raghbir Prasad submitted to him, that no matter how unfounded or scandalous the statements might be and how great an abuse of the privileges of counsel or of the processes of the court, he was protected by the fact that the document had been drafted by a man senior to him.

1926

IN THE
MATTER OF A
VAKIL.

1926

IN THE
MATTER OF A
VAKIL.

This sort of defence has been put up more than once, and we wish the profession to understand that a man who signs his name to a document makes himself thereby in every way as responsible for it as if he was the original drafter of it. If it turns out that the document is one which no man acting honestly could in the circumstances have drafted, then he will be bound to answer for every word, line, sentence and paragraph, and it will not be the least defence that some body else wrote it out and he "only signed it." Signature implies association and carries responsibility. We are of opinion that Ahmad Ashraf having already been told that forgeries had been committed, and having accepted that statement, and being, as he says, frightened on the 8th of January, could not honestly have believed the assertions of forgery by the plaintiffs and court officials alleged by Raghubir Prasad on the 10th of January. Even if the very definite statements in the application for review as to the actual non-existence of X, Y and Z had been doubted by him, a visit to the Collector's office and a five minutes' inspection of the registers would have convinced him of what he already had little doubt about, that the defendants were the forgers and not the plaintiffs.

We therefore find that Ahmad Ashraf did on the 10th of January, 1924, join with Raghubir Prasad in filing the document of that date, and that he well knew that the petition contained false statements, and that these were made to deceive the court and fraudulently and dishonestly to defeat the application.

The second part of the charge against Ahmad Ashraf can be dealt with quite shortly.

When he was examined as a witness on the 24th of September, 1924, the Magistrate was anxious to

ascertain to what extent he had been previously connected with Sheo Autar, Deo Narain Pande and the defendants. He said :—" I had no concern with Sheo Autar, Deo Narain and the defendants from before and to the best of my recollection I did not appear as a pleader for them in any case previous to this." He, in fact, was at the very time appearing for the defendants in another case which had been instituted shortly before No. 298 of 1923 and he was in fact engaged in August 1924 (*i.e.* a month before making his deposition) in execution proceedings in that very case.

1926
IN THE
MATTER OF A
VAKIL.

He sought to justify his answer to the Magistrate by telling us that he thought the point of the question turned upon the words " from before "—that he made a mistake in not remembering that the other case was in fact earlier in date. He also said that on the 24th of September, 1924, he had forgotten that he had signed three papers in August with reference to the execution proceedings.

These answers did not meet with our approval, nor did we give weight to the argument which was addressed to us. It was said, as it has been before in these cases, that it is the common practice of clerks in the mofassil to draft applications and documents even of importance and that the vakil almost invariably signs them without reading them. Ahmad Ashraf explained that he had not read any one of the documents in the execution proceedings and that was why he remembered nothing about the concurrent case.

Again we wish it to be understood that a defence of this kind will not be accepted and that if a legal practitioner puts his signature to a document, he will be deemed to have read it and to carry it in his recollection to the extent that an ordinarily competent,

1926
IN THE
MATTER OF A
VAKIL.

careful and reasonable man would carry it, and he will be bound by all the implications arising from it just as much as if he had written every word of it with his own hand. Practitioners must realize that if they make, or associate themselves with, statements which they know are dishonest and untruthful, for the purpose of misleading the court, they must on proof of misconduct bear personal responsibility, and that it will be no defence for them to say that it was done in the interests of the client or at his instigation or at the instigation of a colleague at the bar, or that they were so negligent in the matter that they did not read the document or consider it at all.

We find the second charge proved against Ahmad Ashraf, and we suspend him on both charges for six (6) months, such periods of suspension to run concurrently.

If, subsequently, cases similar to this are brought before the court, we shall not show the future wrongdoers the leniency we now extend to Ahmad Ashraf. We assess the fee of the learned Government Advocate at Rs. 200.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Dalal.

1926
March, 8.

ABDUL ALI KHAN AND ANOTHER (DEFENDANTS) v.
MUHAMMAD ISMAIL (PLAINTIFF) AND RAHIM
BAKHSH AND OTHERS (DEFENDANTS).*

High Court—Duty of subordinate courts to follow findings of High Court.

Although, even on a question of fact, inferior courts are bound to follow, on the same issues, the findings of fact pronounced by a superior court, there is a broad distinction between a decision by a court having jurisdiction to review facts,

* First Appeal No. 135 of 1925 from an order of Jogindra Nath Chaudhari, Subordinate Judge of Gorakhpur, dated the 2nd of June, 1925.

and an expression of opinion on admittedly imperfect material as to a future issue by a Judge determining a point of law with no authority to determine a question of fact.

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgement of the Court.

Munshi *Haribans Sahai*, for the appellants.

Mr. *Sankar Saran*, for the respondents.

WALSH and DALAL, JJ.:—This judgement cannot stand. We desire to pay every respect to the view taken by the lower appellate court, and to the respect which he himself desires to pay to the opinions expressed in judgements by learned Judges of the High Court sitting in appeal. But the opinion of our learned brother, which the Judge of the lower appellate court has followed in this case, was admittedly a mere dictum on a question of fact, which the learned Judge had no power to decide, because he was sitting in second appeal, and upon evidence which was not the same as the evidence in this suit, upon which the first court had to determine and the lower appellate court had to decide in appeal. If on the same set of facts an appellate court, with jurisdiction to review findings of fact, expresses a definite approval, or definite disapproval, of a particular finding, and the same set of facts comes before an inferior court on a subsequent occasion in a later stage of the same litigation, undoubtedly the view expressed by the appellate court should be followed. The Privy Council have recently pointed out that, even on a question of fact, inferior courts are bound to follow, on the same issues, findings of fact pronounced by a superior court. But there is a broad distinction between a decision by a court having jurisdiction to review facts, and an expression of opinion

1926

ABDUL
ALI KHAN
v.
MUHAMMAD
ISMAIL.

1926

ABDUL
ALI KHAN
v.
MUHAMMAD
ISMAIL.

on admittedly imperfect material as to a future issue by a Judge determining a point of law, with no authority to determine a question of fact. No doubt the Judge in the lower appellate court felt himself limited and hampered by so clear an expression of opinion. But if he had analysed the position, he would have seen that all that the Judge of the High Court had done was, first, definitely to state that he could not interfere with the findings of fact, and secondly, to express a passing opinion that if the only evidence were the evidence of which he then happened to be aware, he would have accepted it. But the matter came before the lower appellate court on a totally different footing, with other evidence, and the lower appellate court could not, whatever respect it might feel for the opinion of a Judge of the High Court, and even though it was willing to follow it, evade the responsibility of deciding the question of fact for himself upon the evidence before him, taking into account the dictum to which his attention was drawn in the High Court's judgement, and which he would be free to follow, or to depart from, if he felt impelled to do so by other evidence.

We must therefore allow the appeal, and inasmuch as the lower appellate court has definitely expressed its view that, if it had not been for the dictum which it followed, it would have adopted the view of the first court, we must restore the judgement of the Munsif with costs here and below.

Appeal allowed.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.

MOHSHAM ALI KHAN (PLAINTIFF) *v.* MULU
(DEFENDANT).*

1926
March, 8.

Civil Procedure Code, order XLI, rule 33—Power of appellate court to pass decree or order in favour of non-appealing defendants—Common defence.

It is open to an appellate court to vary the decree appealed against, where there is a common defence, even in favour of persons who have not appealed but were parties to the suit.

Where the appellate court, proceeding upon a ground common to all the defendants, dismissed the suit of the plaintiff in its entirety and set aside the decree and judgement of the trial court, *held*, that the decree passed by the trial court in his favour against any of the non-appealing defendants ceased to be subsisting and could not be enforced.

Puran Mal v. Krant Singh (1), and *Nizam-ud-din v. Abdul Aziz* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Maulvi Muhammad Abdul Aziz, for the appellant.

Munshi Harnandan Prasad, for the respondent.

KANHAIYA LAL and ASHWORTH. JJ:—The only question for consideration in this appeal is, whether there is a decree capable of execution as against Mulu. It appears that there was an attempt at house-breaking committed at the house of Mulu in 1919. Two persons were named in the first report made by Mulu at the police station, one of whom was Mohsham Ali Khan, the present appellant. Bhawani had accompanied Mulu when he had gone to the police station to make that report. Both the persons named in the report were originally convicted, but on appeal Mohsham Ali Khan was acquitted.

* Second Appeal No. 222 of 1925, from a decree of E. T. Thurston, District Judge of Budann, dated the 4th of December, 1924, confirming a decree of the Munsif of East Budaun, dated the 25th of July, 1924.

(1) (1897) I.L.R., 20 All., 8.

(2) (1900) I.L.R., 31 All., 521.

1926

MOHSHAM
ALI
KHAN
v.
MULU.

The suit which has given rise to this appeal was then brought by Mohsham Ali Khan for damages for malicious prosecution. It was decreed by the trial court both against Mulu and Bhawani. Mulu did not appeal. Bhawani filed an appeal making Mohsham Ali Khan alone a party to it. Mulu subsequently appeared before the appellate court and asked that his name should be added as a co-appellant, alleging that he had paid Rs. 16 to Bhawani for a joint appeal and that Bhawani had fraudulently kept his name out. Bhawani, however, denied that he had been paid any money. The application was therefore rejected.

The appellate court then proceeded to hear the appeal and the conclusion at which it arrived was that Mohsham Ali Khan had failed to establish that he had been falsely named through enmity. It allowed the appeal accordingly, and dismissed the suit of Mohsham Ali Khan, and what is more significant, it set aside the judgement and the decree of the trial court.

An attempt is now being made by Mohsham Ali Khan to execute the decree which had been given to him by the trial court against Mulu. Both the courts below have refused to entertain his application because they found that there was no subsisting decree capable of execution in his favour. Order XLI, rule 33, provides that an appellate court shall have power to make or pass such decree or order as the case may require, and this power may be exercised by it notwithstanding that the appeal is as to a part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not file any appeal or objections. Mulu was not a party to the appeal but he was a party to the original suit which had given rise to that

1926

MORSHAM
ALI
KHAN
v.
MULU.

appeal. Both he and Bhawani filed a joint and common defence. The ground upon which the appellate court proceeded to dismiss the suit was a ground common to Bhawani and Mulu, namely, that no sufficient case for damages had been made out. Although Mulu was not a party to the appeal, the appellate court passed a decree which had the result of dismissing the suit in its entirety and setting aside the judgement and decree which the trial court had passed in the case. It is open to an appellate court to vary the decree appealed against, where there is a common defence, even in favour of persons who have not appealed but were parties to the suit and that is what the appellate court seems to have done.

The learned counsel for the plaintiff has referred to the decision in *Puran Mal v. Krant Singh* (1). That was a case decided under the old Code of Civil Procedure and all that was held therein was that, unless the appellate court proceeded upon a ground common to all the defendants, a defendant who did not appeal was not entitled to the benefit of a decree framed in favour of the others. Even that case is not an authority for the proposition that where the appellate court proceeds upon a ground common to all the defendants and dismisses the suit as against all, the decree passed by the trial court against any of the non-appealing defendants can be enforced. Reference has also been made to the decision in *Nizam-ud-din v. Abdul Aziz* (2). But in that case the suit had been decreed against one of the defendants and dismissed against the other. An appeal was filed by the defendant against whom the claim was decreed and it was held that since the plaintiff had not appealed, the appellate court could not convert the decree of dismissal in favour of the successful defendant into a decree imposing a liability.

(1) (1897) I.L.R., 20 All., 8.

(2) (1900) I.L.R., 31 All., 521.

1926
 MOHSHAM
 ALI
 KHAN
 v.
 MULU.

upon him in an appeal filed by the unsuccessful defendant.

The question is really one of interpretation to be placed on the decree passed on appeal. The decree in question here specifically directed that the suit shall stand dismissed and that the decree and judgement of the trial court should be set aside. In the face of that direction, the view taken by the courts below ought to be upheld.

Appeal dismissed..

Before Mr. Justice Walsh and Mr. Justice Dalal.

1926
 March, 12.

COLLECTOR OF MORADABAD (DECREE-HOLDER) v.
 MUHAMMAD HIDAYAT ALI KHAN (OBJECTOR.)*

Mortgage—Prior and subsequent incumbrances—Right to set up prior mortgage in defence to a suit on a subsequent mortgage.

G held a first and a third mortgage. P held a second mortgage. G sued on his first mortgage and impleaded P; but P, whose estate was then under the Court of Wards, was struck off the array of defendants on an objection as to want of notice of suit, and no decree was passed against him. The property covered by G's mortgage was sold and purchased by H. P, or the Court of Wards, then sued on his intermediate mortgage making G a defendant, but as a subsequent, not a prior, mortgagee. There was no prayer in the plaint that the property might be sold free of incumbrances.

Held that, inasmuch as the plaintiff had not in the former suit challenged G's priority, it was still open to him to set up as a defence his title under his earlier mortgage. *Radha Kishen v. Khurshed Hossein* (1), followed. *Sri Gopal v. Pirthi Singh* (2), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. G. W. Dillon, for the appellant.

Maulvi Iqbal Ahmad, for the respondent.

* Execution First Appeal No. 282 of 1925, from a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 14th of March, 1925.

(1) (1919) I.L.R., 47 Calc., 662. (2) (1902) I.L.R., 24 All., 429.

WALSH and DALAL, JJ. :—The dispute has arisen in the execution of a decree for sale on a mortgage. The property is situated in village Jalalabad. On the 27th of August, 1901, two mortgage deeds of 8 biswas property out of 20 biswas were executed by the owner in favour of Sahu Ganpat Rai, and subsequently, in 1909, the entire village was mortgaged to Sahu Parshadi Lal, whose estate is now under the Court of Wards. Subsequently, in 1912, twelve biswas out of the village was again mortgaged to Ganpat Rai.

In 1913 Ganpat Rai obtained two decrees for sale on foot of the two mortgages in his favour. Parshadi Lal was made a party to the suit, but on objection as to notice being raised by the Court of Wards, Parshadi Lal and the Court of Wards were exempted from the suit and the decree for sale was not passed against them. The decree resulted in a sale in favour of the objector Hidayat Ali Khan in 1916.

In 1914 the Court of Wards sued the mortgagor for sale on foot of the mortgage of 1909 in favour of Parshadi Lal. Ganpat Rai was made a party to the suit but no mention was made in the plaint of his prior mortgage of 1901. It was stated in the plaint that Ganpat Rai was a subsequent mortgagee under the mortgage of 1912 and had therefore a right to redeem. It is also admitted that in the plaint there was no specific prayer that the property should be sold free of incumbrances.

In the execution department Hidayat Ali Khan objected and pleaded that the village should be sold subject to the mortgage of 1909. This objection was granted by the learned Subordinate Judge and from that order the present appeal is filed by the Court of Wards.

1926

COLLEGO-
TOR OF
MORAD-
ABAD
v.
MUHAM-
MAD
HIDAYAT
ALI
KHAN.

1926

COLLEC-
TOR OF
MORAD-
ABAD
v.
MUHAM-
MAD
HIDAYAT
ALI
KHAN.

The learned Government Advocate argued the matter with considerable ingenuity, but we think that the opinion of the lower court is correct. He relied on the Privy Council ruling reported in *Sri Gopal v. Pirthi Singh* (1). That ruling, however, is distinguishable on the ground that in that case the prayer of the subsequent mortgagee was that the property should be sold free of incumbrances. The prior mortgagee, therefore, had notice that his priority was attacked and, in consequence, the prior mortgagee was bound to plead priority and having failed to do so was barred from putting it forward in a subsequent suit or subsequent proceeding in execution.

The facts of the present case are similar to those of the Privy Council case reported in *Radha Krishun v. Khurshed Hossein* (2). Their Lordships held that the prior mortgagee was not barred from putting forward his claim, when the prior mortgage was not impugned in the former suit and the subsequent mortgagee had not sought to displace the prior title of the prior mortgagee and postpone it to his own. To raise the plea of *res judicata* it would be necessary for the subsequent mortgagees as plaintiffs in the former suit to allege a distinct claim in the plaint in derogation of the priority of the prior mortgage. This was not done in the present case. In fact, the appellant omitted to make any mention of the prior mortgage in his plaint, thereby leading the subsequent mortgagee to believe that the appellant, who was well aware of the prior mortgage, accepted its priority. It was argued that the appellant having ignored the prior mortgage, it was the duty of the prior mortgagee to plead his priority. There was no such duty cast on Ganpat Rai. He was not a necessary party except as subsequent mortgagee, and when the appellant failed to mention

(1) (1902) I.L.R., 24 All., 429. (2) (1919) I.L.R., 47 Cal., 662.

his prior mortgage, the presumption would be that its priority was not questioned by the appellant.

We dismiss the appeal with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Lindsay.

DURGA DAS AND OTHERS (PLAINTIFFS) *v.* NAWAB ALI
KHAN AND OTHERS (DEFENDANTS).*

*Muhammadan law—Shias—Inheritance—Widow—Share to
which childless widow is entitled.*

A childless Shia widow, though not entitled to a share in any land left by her deceased husband, is entitled to a one-fourth share in the value of buildings when sold. She is also entitled to her share in all debts owing to her deceased husband, whether those debts were secured by usufructuary mortgage or otherwise. *Aga Mahomed Jaffer Bindanim v. Koolson Beebee* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *Surendra Nath Sen* and *Maulvi Iqbal Ahmad*, for the appellants.

Mr. *B. E. O'Connor* and Mr. *S. A. Haider*, for the respondents.

MEARS, C. J. and LINDSAY, J.:—The order of the Subordinate Judge in this case dismissing the suit of the plaintiffs is erroneous and must be set aside. The suit was a suit for partition, the plaintiffs being the assignees of the interests of a lady named Musammat Kaniz Sughra in the estate of her deceased husband, Mr. Hamid Ali Khan. Mr. Hamid Ali Khan died in the year 1918. He belonged to the Shia persuasion, and the law which regulates the course of inheritance in this case is the Shia law. The heirs left

* First Appeal No. 465 of 1922, from a decree of Man Mohan Sanyal, Subordinate Judge of Moradabad, dated the 20th of May, 1922.

(1) (1897) I.L.R. 25 Cal., 9.

1926

COLLEC-
TOR OF
MORAD-
ABAD

v.
MUHAM-
MAD
HIDAYAT
ALI
KHAN.

1926

March, 24.

1926

DURGA
DAS
•
NAWAB
ALI
KHAN.

by Mr. Hamid Ali Khan were his brother Nawab Ali Khan, his sister Musammat Salim-un-nissa and his widow Musammat Kaniz Sughra. Admittedly the share of the widow in the inheritance is a one-fourth share according to the Shia law where the widow is childless, as Kaniz Sughra is.

On the 22nd of December, 1920, this lady assigned the whole of her interest in this inheritance to the plaintiffs in consideration of a sum of Rs. 15,000.

It is on the basis of this deed of transfer that the plaintiffs came into court asking for a partition of the estate of the deceased and claiming that they were entitled to a one-fourth share in certain property, both movable and immovable.

At this stage it may be observed that the plaintiffs are not entitled to any share in any land left by the deceased. The Shia law is that the childless widow of a Shia is not entitled to a share in the value of any land belonging to her husband, including land which constitutes the sites of buildings. Her one-fourth share includes a share in the proceeds of the sale of the buildings. This was the view of the law which was laid down by their Lordships of the Privy Council in the case of *Aga Mahomed Jaffer Bindanim v. Koolsom Beebee* (1). Therefore, when the plaintiffs set up a claim to a one-fourth share in certain landed properties, their claim was unsustainable.

The learned judge of the court below arrived at the conclusion that the plaintiffs were not entitled to maintain the suit for partition, which he dismissed entirely. In doing so the Subordinate Judge was clearly wrong. It is necessary, therefore, for us to send the case back to the Subordinate Judge in order that he may pass a proper preliminary decree in the partition suit.

(1) (1897) I.L.R., 25 Calc., 9.

We have to point out for the guidance of the court below that the decision of the Subordinate Judge regarding the plaintiffs' interest in certain usufructuary mortgages is erroneous. The Subordinate Judge seems to have thought that the usufructuary mortgages executed in favour of the deceased owner constituted immoveable property in the sense of land, so as to disentitle the widow to any share in property of this nature. This is an erroneous view of the law. The lady is without doubt entitled to her proper share in all debts which were owing to her deceased husband, whether those debts were secured by usufructuary mortgages or otherwise. Her share in the debts must be declared and awarded.

We should like to add for the direction of the court below that if the defendants put forward, as they would be well advised to do, an estimate of the value of the buildings as separate from the land, this valuation should be considered by the plaintiffs as an alternative to a sale; but if the parties cannot agree as to what is the fair one-fourth value of the buildings as distinguished from the site, then the properties will have to be brought to sale. In that event there might also be an agreement that the land and the buildings should be sold as one lot, there being an apportionment as to the value of the buildings and the value of the site, otherwise if the value of the buildings alone is put on to the market the result may be that the price fetched will be very small. We make these observations in the interests of the defendants, who should endeavour to come to a settlement with the plaintiffs as to the valuation of the buildings, if they can possibly do so, so as to avert a sale.

We allow the appeal, set aside the decree of the court below and send the case back to the court of the

1926

DURGA
DAS
v.
NAWAB
ALI
KHAN.

1926

DURGA
DAS
v.
NAWAB
ALI
KHAN.

Subordinate Judge for the preparation of a proper preliminary decree. The preliminary decree having been passed, the court will then take such proceedings as are necessary for the preparation of the final decree.

Costs here and hitherto will abide the result.

REVISIONAL CIVIL.

Before Mr. Justice^a Walsh and Mr. Justice Dalal.

1926
April, 6.

MUNICIPAL BOARD OF BENARES (DEFENDANT) v.
BIHARI LAL AND BROTHERS (PLAINTIFFS).*

Act (Local) No. II of 1916 (United Provinces Municipalities Act), sections 7(h), 116(g), 219(c) and 326—Powers of Municipal Board with regard to public roads—Suit against board for damages on account of alleged malicious action of employee—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 2.

Under the provisions of the United Provinces Municipalities Act, 1916, a municipal board is authorized to close any road within municipal limits and the reason for such action cannot be inquired into by a court of law.

Held also, that the action of a municipal engineer in keeping a road closed for an unnecessarily long time, in order, as was alleged, to injure the plaintiff's business, even if such action was the result of private spite against the plaintiff, would not render the municipal board liable in damages.

Held further, that the effect of section 326(3) of the United Provinces Municipalities Act, 1916, is to give a uniform limitation of six months for the suits mentioned in clause (1), whether the limitation for the suit under the Indian Limitation Act, 1908, be larger or smaller than that period.

Ward v. The General Omnibus Company (1), *Dyer and wife v. Munday* (2), *Davis v. Mayor of the Borough of Bromley* (3) and *Municipal Board of Mussoorie v. Goodall* (4), referred to.

THIS was a suit for damages against the Municipal Board of Benares on account of the closure for

* Civil Revision No. 130 of 1925.

(1) (1873) 42 L.J., (C.P.), 265.

(2) (1895) 1 Q.B., 742.

(3) (1908) 1 K.B., 170.

(4) (1904) I.L.R., 26 All., 482.

repairs of a certain road leading to the plaintiff's brick-kilns. The main allegations on which the suit was based were that the municipal engineer in charge of the work had, out of private malice towards the plaintiffs, closed the road at both ends, instead of only at one, and had delayed the re-opening of it for an unnecessarily long time. The facts of the case are fully set forth in the judgement of the Court.

Dr. *Kailas Nath Katju*, for the applicant.

Pandit *K. N. Laghate* (for *Babu Piari Lal Banerji*), for the opposite party.

WALSH and DALAL, JJ.:—This application in revision from a decree of a Small Cause Court raises interesting questions of municipal law and of the liability of a corporation for the acts of its servants. Unfortunately, the lower court has written a confused judgement and we have been unable to discover what its findings are. The suit was brought for the recovery of damages for loss caused to the respondent, the owner of a brick-kiln, by the defendant Municipal Board of Benares closing a certain road which led to the brick-kiln for a longer period than was necessary for the purposes of repair. Malice of the municipal engineer, Mr. Mitra, was pleaded and it was alleged that the road was closed by him without reason (1) for a long period and (2) at both ends at the same time, in order to injure the business of the plaintiff out of spite. There is no evidence of malice on the part of Mr. Mitra and no finding by the lower court. In 1923 the plaintiff, a municipal servant, was dismissed by the municipality on the report of Mr. Mitra that he had committed theft of documents from a file. All that the lower court finds is: "The municipal engineer was displeased with the plaintiff." What did it expect under the circumstances? The observation or finding,

1926

MUNICI-
PAL
BOARD
OF
BENARES
v.
PIHARI
LAL.

1926
MUNICI-
PAL
BOARD
OF
BIHARI
LAL.

whatever it may be termed, is futile. There is no reason whatsoever why Mr. Mitra should bear the plaintiff any malice.

There is no attempt made in the lower court's judgement to distinguish between the acts of the municipality and those of its servant, Mr. Mitra. It argues in a circle: there was malice because the road was closed for so long and the road was closed for so long because there was malice.

As to the negligence or malice of the defendant municipality there is neither any evidence nor any finding. In the judgement it is stated that no malice was attributed to the chairman or executive officer but only to Mr. Mitra the engineer. Presumably the members did not pass the resolution for repairs out of malice to the plaintiff.

On the basis of evidence placed before it, the learned Judge formed the opinion that the repairs ought to have taken two months and the road ought to have been closed at one end at a time, and as the repairs took four months and the road was closed at both ends, he presumed malice and negligence of the municipality and held the respondent to be entitled to damages. It is after all a matter of opinion how long repairs should take and in the nature of things there would be longer time necessary in doing the repairs if the convenience of the residents was consulted and repairs were done by degrees by closing one end of the road at a time than it would take by working at both ends. If a municipality is to be mulcted in damages for the slackness of an overseer or a contractor, whom it dismisses for such default, no municipal work will be possible. Nowhere in the judgement is it asserted that it was the Corporation by a resolution, or Mr. Mitra, who closed the road at both ends or ordered the contractor to delay

the repairs. There is no finding by reference to any reliable evidence that the road was really ready for use on the 31st of January, 1925, and yet it was not opened till the 27th of February.

In this unsatisfactory state of the lower court's record we did not feel ourselves bound by any finding of fact of that court and inquired of the respondent's learned counsel what the respondent's case really was. He stated it to be that Mr. Mitra, out of malice which he bore to the respondent, kept the road closed for a month longer than was necessary and carried on work at both ends and that the Corporation was liable in damages for the tort of its servant, who was acting tortiously within the scope of his authority.

We are of opinion that Mr. Mitra bore the respondent no malice and that he had no part in the delay, if any, in the repairs. Nobody has stated on oath that he gave orders for the closing of the road at both ends.

As however this is a revision, we shall examine the liability of the municipality, assuming the learned counsel's statement of his client's case to be correct.

First we must express agreement with the lower court's findings on the question of limitation and jurisdiction of a Small Causes Court; our reasons for disallowing the plea of limitation are slightly different. Article 2 of the Limitation Act applies to the present suit. In *Municipal Board of Mussoorie v. Goodall* (1), a Bench of this Court pointed out that the terms of this article were very wide and general. The alleged omission to complete repairs quickly and the closing of the road at both ends would fall within those terms. No other article provides specifically for the alleged acts of negligence and malice of the municipality. Article 36 applies where provision is not made in the

1926

MUNICI-
PAL
BOARD
OF
BENARES
v.
BIHARI
LAL.

(1) (1904) I.L.R., 26 All., 492.

1926

MUNICI-
PAL
BOARD
OF
BINARES
v.
BIHARI
LAL.

schedule and cannot apply here, when article 2 covers the case.

We are, however, of opinion that the provisions of section 326(3) of U. P. Municipalities Act No. II of 1916 extend this period of limitation of 3 months under article 2 of the Limitation Act to one of 6 months. Under clause (1) of that section a notice of 2 months is prescribed, so it could not have been the intention of the legislature to make a suit impossible where the period of limitation prescribed under the Limitation Act is 2 months or less. We think that a uniform limitation of 6 months is prescribed under the special and local Act, whether the limitation for the suit under the Limitation Act be larger or smaller than that period.

The learned counsel for the applicant argued that the suit was one for compensation for obstruction of an easement and hence removed from the cognizance of a Small Causes Court by article 35(i) of the 2nd schedule of the Act. With commendable research he quoted an English authority of 1795, which defined a highway as the property of the State subject to an easement for the benefit of the public. We do not think that we need go so far afield to discover the meaning of the term easement, which should be looked for in the statute law of India. The right of passage that the public have over a road does not come within the definition of an easement given in the Easements Act No. V of 1882, section 4, because it does not depend on the ownership of any landed property. There was no want of jurisdiction in the lower court.

After a reference to statute law and authorities cited at the Bar, our conclusions on the points of law are :

1. That the municipality was authorized to close the road and that the reason for its action cannot be inquired into by a court of law.

2. That the malicious action of Mr. Mitra such as is alleged would not render the municipality liable in damages.

The Municipal Act referred to in this judgement will be local Act No. II of 1916. Under section 7(h) it is the duty of the Board to construct, alter and maintain a public street: under section 116(g) all public streets are vested in and belong to the municipality: under section 219(c) it can turn, divert, discontinue or close any public street vested in it. Presumably this public street of Benares is vested in the Board: there was no allegation to the contrary. The Board has been given power by the legislature to close it permanently without any member of the public having the right to object to it in a civil court. A right of permanent closing of a street includes the right of closing it temporarily because separate power is not granted by the Act for a temporary closing for repairs. Under the first Municipalities Act (XV of 1873) the only power given to a municipality was to clean and repair a road vested in it and none of closing it. It is interesting to notice the difference between the provisions of this present Act and its predecessor, No. I of 1900. Under section 81 of the previous Act, power was given to a municipality to close a street temporarily for purposes of repair. It was possibly apprehended that such limited powers may enable an irate member of the public to raise questions as to the necessity for repair and its duration in a civil court, so in the present Act plenary power is given to close a street without assigning any reason. At the same time, the public are not left without a remedy, which is effective though not spectacular like a suit in a civil court. Under section 34 the Collector of the district or the Commissioner of the Division may be

1926

MUNICI-
PAL
BOARD
OF
BENARES
T.
BIHARI
LAL.

1926

MUNICI-
PAL
BOARD
OF
BENARES
C.
BIHARI
LAL.

moved by any class of the public living along a particular street to get the road opened. If the official is satisfied as to the reasonableness of the request, he may order the municipality to take action accordingly, and, on its failure, may report to the local Government, which may ultimately under section 35 grant redress through the Collector independently of the municipality. A very instructive judgement of the King's Bench Division, *Davis v. Mayor of the Borough of Bromley* (1), may be quoted to show that power given to a local authority to do a certain act cannot be questioned in a civil court on the ground of its having been exercised through malice. It was held that an action will not lie against a local authority for maliciously refusing to approve of building or drainage plans deposited with them. If the local authority has been actuated by improper motives, the remedy of the person aggrieved is by mandamus to the local authority to hear and determine the application. VAUGHAN WILLIAMS. L. J., in delivering the judgement of the court, said:

"In my opinion, where a statute vests in a local authority such a duty and such a power, no action will lie against that authority in respect of its decision, even if there is some evidence to show that the individual members of the authority were actuated by bitterness and some other indirect motive. The intention of the legislature was that there should not be an opportunity of setting aside or getting rid of the decision of a local authority by bringing an action against the authority, and it is obvious that a jury would not be a convenient tribunal for the trial of such an action."

In our opinion, the intention of the local legislature appears to be the same, that a Board's decision to close a street should be taken out of the jurisdiction of civil courts and the reasonableness thereof should be tested by the executive officers of Government, who can afford prompt relief with the force at their disposal.

(1) (1908) 1 K. B., 170.

Finally we think that if Mr. Mitra acted maliciously and spitefully, he did not act within the scope of his authority and the municipality is not liable. Pollock in his *Law of Torts* (10th edition, p. 99) lays down the principle that a master may be liable even for wilful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes and are such acts as might in some circumstances be within the lawful course of employment: and this although the servant's conduct is of a kind actually forbidden by the master. This principle is based on the judgement of BLACKBURN, J. in *Ward v. The General Omnibus Co.* (1), where the learned Judge observed: "A master is responsible for his servant's act in his business though the servant be excited by drink or passion, but if the servant act for private spite (and it does not matter whether the action be in contract or tort), and if the act be done so as to divest him of his character as servant, the master is not responsible."

In the case before us Mr. Mitra is said to have acted through private spite and even disobeyed the direct orders of his master, the municipality, to open the street and thereby divested himself of his character as servant.

In *Dyer and Wife v. Munday and another* (2), where the court of appeal held that there was sufficient evidence on which the Judge might leave the case to the jury on a proper direction, the law laid down was that for all acts done by a servant in the conduct of his employment, and in furtherance of such employment, and the benefit of his master, the master is liable, although the authority he gave is exceeded, provided such acts are done by the servant in the conduct of his employment and in the interest of his master. An

(1) (1873) 43 L. J., (C.P.), 265. (2) (1895) 1 Q. B., 742.

1926

MUNICI-
PAL
BOARD
OF
DEBARES
T.
BIHARI
LAL.

1926
MUNICI-
PAL
BOARD
OF
BENARES
v.
BIHARI
LAL.

engineer acting through spite against an enemy and keeping a road closed to cause injury to that enemy cannot be said to be acting in the conduct of his employment and in the interest of his master. No evidence to connect the members of the municipality or the executive officer with Mr. Mitra's act was forthcoming.

We accept the application and dismiss the respondent's suit with costs of both the courts.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.

1926
April, 7.

NAND KISHORE (DEFENDANT) v. BADAN SINGH
(PLAINTIFF).*

Civil Procedure Code, section 70(1)—Execution of decree—Sale of ancestral property—Collector not competent to set aside sale when once it has been confirmed and the record re-transmitted to the civil court.

The Collector has no power to interfere with a sale or to set it aside after it has been confirmed and the decree re-transmitted to the civil court, though he can make any correction in the sale certificate to make it conform with the proclamation of sale, as a consequential or incidental exercise of the authority vested in him to grant a certificate of sale after the sale is confirmed.

Ragho Prasad v. Mewa Lal (1), and Prem Chand Dey v. Mokhoda Debi (2), referred to.

THE facts of this case are fully set forth in the judgement of KANHAIYA LAL, J.

Munshi Narain Prasad Ashthana, for the appellant.

Babu Piari Lal Banerji, for the respondent.

* Second Appeal No. 980 of 1923, from a decree of E. Bennet, District Judge of Agra, dated the 13th of March, 1923, confirming a decree of Harihar Prasad, Additional Subordinate Judge of Agra, dated the 19th of January, 1921.

(1) (1911) I.L.R., 34 All., 223.

(2) (1890) I.L.R., 17 Calc., 699.

KANHAIYA LAL, J.—In execution of a decree held by Nand Lal against Musammatt Chanda Dei and Kameshri Singh, certain property was put up to sale as ancestral property belonging to the judgement-debtors, by the Collector. The sale was held on the 20th of November, 1916, and confirmed on the 2nd of January, 1917. The property was purchased by Badan Singh, who obtained a certificate of sale on the 4th of April, 1917, from the Collector, and in pursuance of that certificate of sale he subsequently obtained formal possession from the civil court on the 23rd of May, 1917.

1926

NAND
KISHORE
v.
BADAN
SINGH.

When the auction-purchaser applied for the entry of his name in the revenue papers, the judgement-debtors filed an objection as to the nature or extent of the interest purchased by the auction-purchaser, and while that application was pending, the judgement-debtors made an application to the Collector, asking that the certificate of sale should be corrected, to bring it into conformity with the property actually sold, as specified in the proclamation of sale. The application was made on the 12th of June, 1917, long after the sale had been confirmed and formal possession delivered by the civil court to the auction-purchaser. The Collector, however, proceeded to inquire into the application and on the 18th of November, 1917, he passed an order setting aside the sale by reason of what he described as "grave confusion" in describing the property intended to be sold, and he directed a fresh sale to be held after ascertaining from the civil court whether the sale was to be effected in respect of the rights of the judgement-debtors in the said property as mortgagors, or as mortgagees, or both. At the same time he directed the stay of the mutation proceeding arising out of the previous sale.

1926

NAND
KISHORE
v.
BADAN
SINGH.

*Kanhaiya
Lal, J.*

The validity of that order is challenged by the plaintiffs in the present suit and both the courts below have come to the conclusion that the order of the Collector, setting aside the sale, was without jurisdiction and that the sale of the 20th of November, 1916, gave a good title to the plaintiff.

The question for consideration in this appeal is whether the Collector had jurisdiction to set aside the sale after it had been confirmed by him and the proceedings had been re-transmitted to the civil court which had transferred the decree to him for execution. It is suggested on behalf of the defendants appellants that the Collector had power to review his previous order confirming the sale. But there is nothing in his order to suggest that he was exercising that power. On the other hand, the Collector, referring to the proceedings connected with the sale, pointed out that there had been some confusion in describing the property intended to be sold, and that the property had fetched in consequence an inadequate value, and he proceeded to hold that there was in consequence sufficient ground for interfering with the sale after the expiry of the ordinary period of objection.

Section 70(1) of the Code of Civil Procedure empowers the Local Government to make rules for the transmission of the decree for the sale of certain classes of property from the civil court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same and for re-transmitting the decree from the Collector to the court. It further empowers the Local Government to make rules for appeals from orders made by the Collector, or any gazetted subordinate of the Collector to whom the proceedings may have been transferred, to superior revenue authorities and also for revision by such superior

revenue authorities. Sub-section (2) of section 70 goes on to provide that the power conferred by the rules made under the previous sub-section upon the Collector or upon any appellate or revisional authority, shall not be exercisable by the "court," implying thereby the court which had transmitted the decree for execution, or by any court in exercise of any appellate or revisional jurisdiction which it has with respect to the decrees or orders of such court. It does not prohibit a court from taking cognizance of a suit intended to question the validity of the exercise by the Collector of a jurisdiction which is not vested in him. for section 9 of the Code of Civil Procedure gives the civil courts jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. A suit in which a right to property is involved is a suit of a civil nature, and if the Collector had no jurisdiction to set aside the sale after he had confirmed it and re-transmitted the decree to the civil court, the validity of that order, so far as it affects the title vested in the auction-purchaser, can be legitimately questioned by the party concerned in the civil court.

The rules framed by the Local Government under section 70 of the Code of Civil Procedure provide that where a sale is held and confirmed by the Collector, the Collector shall, as soon as may be after the confirmation of the sale, re-transmit the decree and all papers received therewith to the court by which the decree was transmitted, together with a report of its proceedings and an account showing the monies realized under the decree and the sum available at the disposal of the court. It further lays down that all subsequent proceedings in connection with the decree and delivery of possession to the purchaser shall be taken under the

1926

NAND
KISHORE
r.
BADAN
SINGH.Kanhaiya
Lal, J.

1926

NAND
KISHORE
v.
BADAN
SINGH.

Kanhaiya
Lal, J.

orders of the court transmitting the decree for execution.

The Collector has no power left to interfere with the sale or to set it aside after it has been confirmed and the decree re-transmitted to the civil court, though he can make any correction in the sale certificate to make it conform with the proclamation of sale, if he is approached for the purpose, as a consequential or incidental exercise of the authority vested in him to grant a certificate of sale after the sale is confirmed. In *Ragho Prasad v. Mewa Lal* (1), it was held by their Lordships of the Privy Council that an order for sale passed without jurisdiction conveyed no property to the person declared to be the purchaser. On the same principle, a sale held by a court having no jurisdiction, in execution of a decree to sell property not situated within its territorial limits, was held, in *Prem Chand Dey v. Mokhoda Debi* (2), to be a nullity, and to convey no rights to the auction-purchaser.

It has been urged on behalf of the defendants appellants that an appeal had been filed from the order of the Collector setting aside the sale to the Commissioner and upon a reference by the Commissioner, the Board of Revenue decided to uphold the order passed by the Collector setting aside the sale. But if the order passed by the Collector was without jurisdiction, the fact that that order was upheld by the Board of Revenue would make no difference. The auction-purchaser is entitled to say that the order setting aside the sale was passed after the Collector had ceased to have any authority over the execution proceeding on the re-transmission of the decree to the civil court, and the title, which is vested in him under the certificate of sale after it was confirmed by the Collector, is a

(1) (1911) I.L.R., 34 All., 223.

(2) (1890) I.L.R., 17 Cal., 699.

good and subsisting title capable of being enforced through a competent court.

It appears that the judgement-debtors were originally mortgagees of the disputed property but had subsequently purchased the right, title and interest of four of the descendants of the original mortgagor and had thus acquired a portion of the equity of redemption. It does not appear what was the nature of the original interest proclaimed for sale, and whether the property described in the certificate of sale corresponded with the property which was mentioned in the proclamation of sale. The certificate of sale describes the properties sold as the right, title and interest which the judgement-debtors had acquired by the purchase of the equity of redemption from the four persons aforesaid and it purports to include the mortgagee rights which the judgement-debtors held in those properties, and which had merged in the equity of redemption when the judgement-debtors purchased the same. The rights of the parties to the sale proceedings are determined by the certificate of sale, which finally vests the property in the auction-purchaser, and subject to any mistakes in the certificate of sale, which it is always open to the court or officer granting the certificate of sale to correct, the title so acquired cannot be afterwards disturbed in any subsequent proceeding at the instance of any person who was a party to the confirmation of the sale. The appeal, therefore, fails and is dismissed with costs.

ASHWORTH, J.—I concur. There can be no question that the Collector's order, in setting aside the sale after he had confirmed it, was *ultra vires*. Nor will the fact that the order of the Collector was upheld in appeal and revision in higher courts of revenue, render it binding on a civil court, in a suit for declaration as to proprietary title. The jurisdiction of the

1926

NAND
KISHORE
v.
BADAN
SINGH.

1926

NAND
KISHORE
v.
BADAN
SINGH.

civil court is only affected by action of the Collector within the scope of the authority conferred upon him by section 70 of the Civil Procedure Code, and the rules made under that section.

Appeal dismissed.

1926
April, 8.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.
RAJA RAM (PLAINTIFF) v. CHHADAMMI LAL (DEFENDANT).*

Civil Procedure Code, section 47—Mortgage—Prior and subsequent incumbrances—Suit by first mortgagee—Second mortgagee made a party and then exempted—Suit for sale by second mortgagee not barred.

A prior mortgagee brought a suit for sale on his mortgage and impleaded a subsequent mortgagee as defendant. In the course of the suit, however, the counsel for the plaintiff stated that this second mortgage had been paid off, and, in spite of the denial of the puisne mortgagee that this was so, the court acted on that statement and exempted the puisne mortgagee, without trying that issue or the issues raised by him in the suit. A decree for sale was passed in favour of the plaintiff, and it was mentioned in the decree that the puisne mortgagee had been exempted from the suit. The puisne mortgagee thereafter brought a suit for sale on his mortgage.

Held that section 47 of the Code of Civil Procedure was no bar to such suit. *Vaddadi Sannamma v. Koduganti Radhabhaya* (1), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Dr. Kailas Nath Katju, Mr. T. N. Chadha and Mr. L. M. Roy, for the appellant.

Babu Piari Lal Banerji and Munshi Panna Lal, for the respondents.

* Second Appeal No. 981 of 1923, from a decree of E. T. Thurston, District Judge of Budaun, dated the 16th of March, 1923, reversing a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 30th of November, 1922.

(1) (1917) I.L.R., 41 Mad., 418.

KANHAIYA LAL and ASHWORTH, J.J. :—The question for consideration in this appeal is whether the claim of the plaintiff was barred by section 47 of the Code of Civil Procedure. It appears that certain property was mortgaged by Gokul Chand in favour of Chhadammi Lal, his cousin, on the 20th of May, 1909. Subsequently another mortgage was made by Gokul Chand in favour of Raja Ram, on the 6th of September, 1911.

1926

RAJA
RAM
v.
CHHADAMMI
LAL.

On the 18th of August, 1920, Chhadammi Lal filed a suit on his mortgage, making Raja Ram a party. The defence of Raja Ram was that the mortgage deed had been paid up, but before that plea could be tried, the counsel for Chhadammi Lal stated that the mortgage bond held by Raja Ram had been paid up, and that Raja Ram should consequently be exempted from the claim. Raja Ram, however, denied that the money due on his mortgage bond had at any time been paid, but the court, acting on the statement of the counsel for Chhadammi Lal, exempted Raja Ram from the claim, without trying that issue or the issue which Raja Ram had raised in the suit. A decree was eventually passed in favour of Chhadammi Lal for the sale of the mortgaged property, and it was mentioned in the decree that Raja Ram had been exempted from the suit.

The present suit was filed by Raja Ram for the recovery of the money due on his mortgage, and Chhadammi Lal was impleaded as one of the defendants. The allegation of Raja Ram was that the mortgage bond held by Chhadammi Lal had really been paid up, and that the decree obtained by Chhadammi Lal on foot of that mortgage against Gokul Chand and his sons was collusive and fraudulent.

1926

RAJA
RAM
v.
CHHADAMMI
LAL.

It appears that during the progress of the execution proceedings arising out of the decree obtained by Chhadammi Lal, an objection was filed by Raja Ram that no execution should be allowed against the property affected by his mortgage, because the decree had exempted him from the claim. Chhadammi Lal opposed that objection, and asked for the notification of the mortgage set up by Raja Ram in the proclamation of sale. The court before which the execution proceeding was pending held that it was not competent to go behind the decree which directed a sale of certain property; and that though complications were likely to arise by reason of the subsequent mortgagee having been exempted from the claim, it had no option but to overrule the objection, and at the same time to notify in the proclamation of sale that Raja Ram was made a party to the suit and was subsequently exempted from it.

The contention is that by reason of the proceedings in the previous suit instituted by Chhadammi Lal, to which Raja Ram was a party, section 47 of the Code of Civil Procedure barred the present claim. There was a further plea raised by Chhadammi Lal that the mortgage bond in suit had been paid up, but the finding of the trial court on that point was that no such payment was established. Raja Ram had in fact asserted that the mortgage held by Chhadammi Lal had been paid up, and the trial court found on that point in his favour. The claim of Raja Ram was accordingly decreed by it, but on appeal the lower appellate court, without going into these matters, dismissed the suit, holding that it was barred by section 47 of the Code of Civil Procedure.

The explanation appended to section 47 of the Code provides that for the purpose of that section a

plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed shall be deemed to be parties to the suit. The intention obviously is that for the purpose of *deciding questions arising between the parties to the suit* in which the decree was passed, or their representatives, and *relating to the execution, discharge and satisfaction* of the decree, a person who has been exempted from the claim will be deemed to be as much a party to the suit as a person against whom the decree has been passed. In other words any question relating to the execution, satisfaction or discharge of the decree, arising between persons who were parties to the suit, whether exempted or otherwise, must be decided in the execution proceeding arising out of the decree passed in the suit to which he was such a party. The question must, however, relate to the execution of that decree and must not seek to challenge its validity, for no court executing a decree can go behind it; and if a person seeks to challenge the validity of the decree, the only remedy open to such a person is, if the matter has not already been finally determined in the suit, to get it adjudicated by a separate suit, or in such other manner as may be open to him according to law.

The present plaintiff seeks by means of this suit to challenge the propriety of the decree which was passed in the case in favour of Chhadammi Lal against Gokul Chand and his sons. He was a party to the suit. He had pleaded that the mortgage then in suit was no longer subsisting and had been already discharged. That plea was not inquired into, and, on the oral application of Chhadammi Lal, the present plaintiff was then exempted from the claim. That matter, therefore, can now be determined in the present suit. That decree cannot operate as *res*

1926

RAJA
RAM
v.
CHHADAMMI
LAL.

1926

RAJA
RAM
v.
CHHADAMMI
LAL.

judicata against the present plaintiff, because the matter had not been decided, and no question relating to the validity or otherwise of that decree can be entertained at the instance of a party to the suit or decree, in a proceeding taken by the decree-holder to enforce that decree. As pointed out in *Vaddadi Sannamma v. Koduganti Radhabhayi* (1), where a person has been properly impleaded as one of the defendants in a suit, but the suit is dismissed against him on account of the election by the plaintiff to abandon his case so far as it affects that defendant, such a person is a defendant against whom the suit has been dismissed for the purpose of the determination of any question relating to the execution, satisfaction or discharge of that decree. The question now raised is, however, not a question relating to the execution, satisfaction or discharge of the decree. It is a question which goes to the root of the decree itself and challenges its validity, and that question cannot be determined except by a separate suit.

The lower appellate court has referred to the decision in *Data Din v. Nanku* (2), but that was a case in which a suit was brought against a Hindu father and his son for the recovery of money due on a mortgage, and for some reason or another a simple money decree was passed against the father alone, and the son was exempted. An attempt was subsequently made to attach and sell the share of the son in the joint family property, and it was held by this Court that the liability of the share of the son for the payment of that decree on the ground of his pious obligation could be inquired into under section 47 of the Code of Civil Procedure. The position of a son, who is under a pious obligation to pay the debts due by his father, however, stands on a widely different footing

(1) (1917) I.L.R., 41 Mad., 418. (2) (1918) 16 A. L. J., 752.

1926

RAJA

RAM

v.

CHHADANMI

LAL.

from that of a subsequent mortgagee, who has to be impleaded to give him an opportunity to redeem, and who is competent to raise any objection to a decree being passed against the property of which he is the subsequent mortgagee. There is no obligation on him to pay the prior mortgage, if he questions its validity or denies that it is subsisting; and that matter must be determined either in the suit brought by the prior mortgagee for the enforcement of the mortgage, if he is made a party to it, or in a separate suit if he has been exempted from the claim, leaving the matter undetermined. Reference has also been made to the decision in *Parbhu Dayal v. Anandi Din* (1), but there too the decree was a personal decree, in execution of which some property was attached which was held under a usufructuary mortgage, and the question was rightly held to be one relating to the execution, discharge or satisfaction of the decree. That is not the case here. Section 47, therefore, has no application. The other points raised in the appeal have not been determined by the lower appellate court.

The appeal is therefore allowed, and the case is remanded to the lower appellate court with a direction to re-admit the appeal under its original number and to dispose of it after determining the other points raised therein in the manner provided by law. The costs here and hitherto shall abide the result.

(1) (1919) 17 A. L. J., 839.

MISCELLANEOUS CIVIL.

Before Mr. Justice Mukerji.

1926
April, 16.

IN THE MATTER OF J. H. CHANDLER AND CO. LTD., (IN
LIQUIDATION).*

*Act No. VII of 1913 (Indian Companies Act), section 30—
Liquidation—Contributory—Person agreeing to take
shares and signing the memorandum of association though
not entered in the register as a share holder—Limitation.*

P agreed to purchase shares in a newly started company and subscribed to the memorandum of association before it was filed with the Registrar. Later, he asked the promoter of the company to cancel his "requirements" and as a matter of fact P's name was never entered in the register of members. Eventually the company went into liquidation. *Held*, that P was liable as a contributory to make good the value of the shares for which he had signed. *In re the Machine Exchange Company* (1), and *Union Bank, Allahabad, Ltd.*, (2), referred to.

Held, further, on a question of limitation, that the cause of action for a claim by the official liquidator to recover contributions from the contributories could not arise before the appointment of the official liquidator.

THE facts of this case are fully stated in the judgement of the Court.

Babu Indu Bhushan Banerji, for the Liquidator.

Mr. F. Owen O'Neil, for Mr. H. I. Phillips.

MUKERJI, J.—The official liquidator claims a sum of Rs. 1,000 from Mr. H. I. Phillips, Agent of the Allahabad Bank Ltd., at Patna, on the ground that he is a contributory inasmuch as he agreed to purchase 100 shares of Rs. 10 each by subscribing to the memorandum of association before it was filed with the Registrar.

* Miscellaneous Case No. 386 of 1925.

(1) (1887) I.L.R., 12 Bom., 311. (2) (1925) I.L.R., 47 All., 669.

Mr. Phillips denies his liability and has filed an affidavit to state the facts. The affidavit is really the basis on which the case is to be decided, because there is no counter affidavit.

1926
IN THE
MATTER OF
J. H. CHAND-
LER AND Co.

The facts appear from the affidavit to be these. Mr. Chandler, who was anxious to float the company, approached Mr. Phillips, and at his request Mr. Phillips signed the memorandum to be attached to the Articles of Association, to be forwarded to the Registrar, Joint Stock Companies, for registration. Mr. Phillips admits that he put himself down for 100 shares. It also appears from the affidavit that in 1921, apparently after the registration of the company, Mr. Phillips received a letter from Mr. Chandler asking him if he was going to take the shares. Mr. Chandler made the inquiry because an allotment of shares was going to be made. Mr. Phillips replied that he was no longer in a position to subscribe for the shares and he asked Mr. Chandler to cancel his "requirements." Mr. Phillips says further that thereafter he never had any talk with Mr. Chandler about those shares and that he understood and believed that the whole incident about the purchasing of shares had closed for good.

On these facts it is contended on behalf of the official liquidator, that in view of the provisions of section 30 of the Indian Companies Act, Mr. Phillips became a member and therefore became liable as a contributory to make good the value of the entire number of shares for which he had signed. It is common ground that Mr. Phillips' name was never entered in the register of members. The question is whether, in the circumstances, Mr. Phillips is liable as a contributory.

1926

IN THE
MATTER OF
J. H. CHAND-
LER AND CO.

Before proceeding to deal with the subject it would be necessary to mention Mr. *O'Neil's* argument on behalf of Mr. Phillips. He argued that the object of obtaining Mr. Phillips' signature was really this, that the signature of Mr. Phillips should serve as an advertisement, *viz.*, a gentleman of Mr. Phillips' position was going to take so many shares and that it was believed by the promoter that the signature of Mr. Phillips would attract more subscribers. Supposing that this was the case, I should think that Mr. Phillips' responsibility would increase and not decrease. If he meant to allow his name to be used to attract other subscribers, I think he would be in duty bound to take all the shares for which he put down his name. The affidavit of Mr. Phillips, however, does not go so far as Mr. *O'Neil* would put it. Indeed, let it be said to his credit, that Mr. Phillips does not say that he allowed his name to be used as a lure or decoy for the purpose of attracting subscribers.

Coming to the question of law, it seems to me perfectly clear. In the language of section 30 of the Indian Companies' Act, the subscribers to the memorandum of a company *shall be deemed* to have agreed to become members of the company. It is true that the section lays down that on the registration of the company the names of the subscribers of the memorandum shall be entered as members in the register of members. But, from the mere omission of the entry of the names in the share register, it does not follow that the subscribers to the memorandum are not to be deemed to have agreed to become members. The first portion of the first paragraph of section 30 lays down a rule of substantive law and the second portion lays down a rule of procedure, *viz.*, what is to be done. The subsequent portion does not, in my opinion, govern the earlier portion.

1926

IN THE
MATTER OF
J. H. CHAND-
LER AND Co.

The law on the point in India is the same as the English law, and in Palmer's Company law, 12th edition, at page 105, it is clearly indicated that every subscriber to the memorandum of association becomes a member, *ipso facto*. Indian cases on this point are not also wanting and the case of *In re the Machine Exchange Company* (1) will be found to be in point. I hold that Mr. Phillips is liable as a contributory.

At the close of the reply by the counsel for the official liquidator, Mr. O'Neil drew my attention to the question of limitation. He contented himself with merely mentioning the point because it had not been raised in the pleadings. I have considered the point and I am of opinion that no bar of limitation exists in the present case.

The nature of the proceeding is this. The official liquidator, on his appointment, is seeking recovery of contributions from the contributories. The cause of action would arise only on the appointment of an official liquidator and not earlier. A somewhat similar point arose in the case of *Union Bank, Allahabad, Ltd.*, (2), and was considered by a Division Bench of this Court. The claim was based on an alleged misfeasance of certain directors and the question was when the cause of action arose in favour of the official liquidator. The court held that the cause of action could not have arisen before the appointment of the official liquidator. I would hold a similar view in this case and I am of opinion that no bar of limitation exists in this case.

I declare that Mr. Phillips is liable to pay a sum of Rs. 1,000 as a contributory. He will pay the liquidator's costs of his present application.

Application allowed.

(1) (1887) I.L.R., 12 Bom., 311.

(2) (1925) I.L.R., 47 All., 669.

REVISIONAL CIVIL.

Before Mr. Justice Daniels.

1926
April, 26.

SECRETARY OF STATE FOR INDIA IN COUNCIL.
(APPLICANT) v. U.P. GLASS WORKS (OPPOSITE PARTY).*

Act No. IX of 1890 (*Indian Railways Act*), section 72(2) (b)
—*Railway—Liability of railway company in respect of goods consigned under risk-note form H.*

Held on a construction of the new form of agreement known as "risk-note H" that the railway administration is liable for non-delivery of the entire consignment or of one or more complete packages if it fails to disclose in detail how it has dealt with the consignment, or if the effect of such disclosure gives rise to a presumption of misconduct, or if misconduct be otherwise proved, but it is protected from liability for loss, including non-delivery, of part of a consignment not consisting of one or more complete packages.

East Indian Railway Co. v. Kishan Lal Tirkha Mal (1) and *Ghelabhai v. The East Indian Railway Co.*, (2) referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. G. W. Dillon, for the applicant.

Munshi Panna Lal, for the opposite party.

DANIELS, J.—This revision raises a question of the liability of a railway company under the new form of risk-note H approved by the Government of India, under section 72 (2) (b) of the Indian Railways Act, and published in the *Gazette of India*, part I, page 651 of the Gazette for 1924. The risk-note B and risk-note H are substantially identical, both in the new and in the old form, so that rulings which apply to the one form are applicable to the other also. Risk-note B refers to a particular consignment, risk-

*Civil Revision No. 31 of 1926.

(1) (1923) I.L.R., 45 All., 530.

(2) (1921) I.L.R., 45 Bom., 1201.

note H to all consignments sent by a particular consignor under a common agreement.

The facts are very simple. The plaintiff consigned fifteen tons of coal under risk-note from Jayramdi No. 3 Colliery siding (Sitarampur station) to Bahjoi (O. & R. Ry.). At destination five tons were found to be short and only ten tons were delivered. The line being a Government line, the plaintiff company sued the Secretary of State for the value of the shortage. The learned Judge of Small Cause Court decreed the suit on the view taken in a number of authorities, of which *East Indian Railway Company v. Kishan Lal, Tirkha Mal* (1) may be taken as an example, that "loss" means actual loss of goods by the railway company, and that where the plaintiff merely alleges short delivery, it lies on the railway company to give some evidence of loss before they can claim the protection of the risk-note. *Ghelabhai v. The East Indian Railway Company* (2) is the leading case on the point.

All these rulings were based on the old form of risk-note. The learned Government Advocate contends that they are inapplicable to the new form. The main provision protecting the railway from responsibility for "loss, destruction or deterioration of, or damage to, the said consignment" is the same in both cases, but the exception has been replaced by two provisos, the language of which is materially different. The words "wilful neglect" have been replaced by the word "misconduct". Under the old form the burden of proving "wilful neglect" was in all cases on the consignor, though it might of course be proved by circumstantial evidence. In the new form there are two provisos which run as follows :—

"Provided that in the following cases :—(a) Non-delivery of the whole of the said consignment, or of the whole

(1) (1923) I.L.R., 45 All., 590.

(2) (1921) I.L.R., 45 Bom., 1201.

1926

SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
U. P.
GLASS
WORKS.

1926

SECRETARY
OF STATE
FOR INDIA
IN COUNCILv.
U. P.
GLASS
WORKS.

of one or more packages forming part of the said consignment, packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand, and fully addressed, where such non-delivery is not due to accidents to trains or to fire; (b) pilferage from a package or packages forming part of the said consignment properly packed as in (a), when such pilferage is pointed out to the servants of the Railway Administration on or before delivery,—the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor."

The learned Government Advocate argues with much force that the word "non-delivery" has been deliberately inserted to make it clear that non-delivery is to be treated as a case of loss. If non-delivery is not equivalent to loss within the meaning of the agreement, such non-delivery cannot by itself in any case lay on the consignor the burden of proving misconduct. It would, therefore, be futile and meaningless to provide that where non-delivery is of the whole consignment, or of the whole of one or more packages, the railway company must show in detail how the consignment was dealt with before the burden of proving misconduct can be cast on the consignor. A proviso is in its nature an exception to what precedes, but if "loss, destruction, deterioration or damage" on the one hand and "non-delivery" on the other are two quite different things, then the so-called proviso is not a proviso at all and deals with matters outside the scope of the general rule. It is also significant that the words "non-delivery of the whole of the said consignment or of the whole of one

or more packages forming part of the said consignment" correspond to the words "except for the loss of a complete consignment or of one or more complete packages forming part of a consignment" in the superseded form.

The respondent's contention is that the railway is protected by the proviso in the event of non-delivery of the whole consignment, but is not protected in the event of short delivery, unless the portion undelivered consists of a complete package or packages. This construction is contrary to the policy on which these risk-notes have always been framed. The policy underlying them has always been to give complete protection for the loss of part of a consignment not consisting of an entire package or packages (possibly because such loss is especially difficult both to prevent and to detect), but only partial protection against the loss of the entire consignment. The effect of the new form of agreement, in my opinion, is that the railway is liable for non-delivery of the entire consignment, or of one or more complete packages, if they fail to disclose in detail how they have dealt with the consignment, or if the effect of such disclosure gives rise to a presumption of misconduct, or if misconduct be otherwise proved, but is protected from liability for loss, including non-delivery, of part of a consignment not consisting of one or more complete packages. In this view the rulings relied on by the court below are no longer applicable and the suit must be dismissed. I accordingly allow the revision and dismiss the suit with costs.

As this is a case of first impression and the revision has been filed in order to obtain a decision as to the effect of the amendment of the risk-note, I direct that the parties bear their own costs in this Court.

Application allowed.

1926

SECRETARY
OF STATE
FOR INDIA
IN COUNCIL

J. P.
GLASS
WORKS.

MISCELLANEOUS CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice King.*

1926
April, 30.

GOSHAIN AND OTHERS (APPLICANTS) v. PURAN SINGH
AND OTHERS (OPPOSITE PARTIES).*

*Civil Procedure Code, section 100—Second Appeal—Finding
based on documentary evidence, when assailable in
second appeal and when not.*

If a finding of a court of first appeal is based upon the construction of instruments of title or of contracts or statutes or any other documents which may be the direct foundation of rights, the court's view of the legal effect of such documents is open to question by a court of second appeal. If, however, all that the lower appellate court is called upon to do is to consider the history of a case by collecting together and putting in their chronological order sale-deeds, mortgages, leases etc., and all these documents are mere pieces of evidence involving no question of construction, then the inference which the court draws from those mere pieces of evidence is a fact which cannot be upset by the second appellate court. *Midnapur Zemindary Co., Ltd. v Uma Charan Mandal* (1) followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. M. L. Agarwala, for the applicants.

Babu Piari Lal Banerji, for the opposite parties.

MEARS, C. J., and KING, J :—This is a reference submitted to the High Court under rule 17 of the rules and orders relating to the Kumaon Division. This High Court is asked to give a ruling as to whether the Commissioner was right in upsetting the judgement and decree of the first appellate court on a point of fact by taking into consideration the evidence on the record on which the first appellate court had come to a contrary conclusion. The position is this :—We are

* Miscellaneous Case No. 183 of 1925.
(1) (1923) 21 A.L.J., 723.

not asked to say whether we prefer the judgement of the Commissioner or the judgement of the District Judge. What we are asked to do is to consider what was the matter in dispute between the parties, by what documents and evidence the case was proved, what were the documents and evidence which led the District Judge to the conclusion at which he arrived and what were the documents and evidence which led the Commissioner to the conclusion that he arrived at, and was the Commissioner entitled to come to a contrary finding which in effect upset the District Judge on a finding of fact. It is necessary just to give an outline of the case so that the position may be understood. The plaintiffs claimed recovery of possession of a certain field and declaration of rights over another area of land. The point that really arose was this. What was the extent of the interest of the plaintiffs' vendors in the land which they, the vendors, purported to convey in its entirety to the plaintiffs? The District Judge had to come to a conclusion as to the relationship which the hamlet called Kanwaldhurra bore to the neighbouring village of Baghar, and after reciting that the vendors to the plaintiffs were co-sharers of Kanwaldhurra and the defendants Nos. 1—4 were co-sharers of Baghar, he then goes into certain matters of history of the two villages, as he describes them, and he points out circumstances which show, on the one hand, that the villages are separated and on another view of the case that the hamlet was considered to be an appendage to the village. He then considers the bearing on the case of an important document which he describes as the *razinama* of 1844. From what he considers to be the true construction of that document, he infers that the villagers " apparently agreed that Kanwaldhurra should be separated and there was in the *razinama* a reference to a sale or decree by which

1926

GOSHAIN

v.

PURAN
SINGH.

1926
GOSHAIN
v.
PURAN
SINGH.

the Kanwals of Kanwaldhurra, from whom the plaintiffs derived title, had obtained 4 thoks." Then the learned District Judge deals with a partition of 1885, and he recites what was done at that partition and he infers from the documents before him that the *khata*s in suit were not *sanjaitgaon* of the whole village of all the co-sharers. He thought that the entry showed that the *khata*s and fields in suit still remained, notwithstanding the *razinama* of 1844, the property of certain co-sharers and that the whole right, title and interest of these properties had not passed exclusively to the plaintiffs' vendors. That was the conclusion which the learned District Judge drew from a construction of various documents, the most important one being the *razinama* of 1844. In the result he decided that the plaintiffs were only entitled to the extent of the shares which were laid down in *phant* and *muntakhib*. That was as regards one plot of land and he disallowed their claim for possession over plot 5497. Now the question which we have got to answer is, whether, when a matter of this kind comes up in appeal, the Commissioner is bound to accept the interpretation which the District Judge has put upon a particular document. Our answer to that question is that it must depend upon what is the nature of the document. If the District Judge gives what he considers to be the proper construction of instruments of title or of contracts or statutes or any other documents which may be the direct foundation of rights, his view of the legal effect of such documents may undoubtedly be questioned before the Commissioner. If, however, all that he is called upon to do is to consider the history of a case by collecting together and putting in their chronological order sale-deeds, mortgages, leases, etc., and all these documents are mere pieces of evidence involving no

1926

GOSHAIN
v.
PURAN
SINGH.

question of construction, then the inference which the District Judge draws from those mere pieces of evidence, is a fact which cannot be overset by the Commissioner. The distinction is a somewhat fine one, and the case which is relied upon as an authority is that of *Midnapur Zamindary Company Ltd. v. Uma Charan Mandal* (1). The test, therefore, in all these cases is, is the conclusion of fact, which in appeal a party seeks to get rid of by argument before the Commissioner, a question of fact founded upon the effect of a series of documents or of one document quite apart from any difficulties of construction, treating the documents as being narratives of events recorded in them? If they are merely narratives of events recorded in them, such as 12 documents produced to show that the ryots in a certain village were unable to sell their houses, and if the phraseology of the documents is such that they give rise to no difficulties of construction, those documents must be treated as part of the history of the case and a conclusion founded upon them cannot be made the subject of second appeal. If, however, the documents, which are transfers and are tendered to prove the rights of ryots to transfer their houses,, give rise in the very body of the documents to questions of nicety of construction, then whatever decision the District Judge may come to can be challenged in appeal before the Commissioner. That appears to be the principle underlying the *Midnapur Zamindary Company* case. Applying that principle to this case we are of opinion that one has only to examine the method by which the District Judge approached the *razinama* of 1844 to prove that he was there endeavouring to ascertain what were the legal rights created. And similarly, when one examines the manner in which the Commissioner approached that

(1) (1923) 21 A.L.J., 723.

1926
GOSHAIN
v.
PURAN
SINGH.

document; he was clearly endeavouring to give to it what he regarded as its legal construction. He said: "It does seem to me that the *iqarnama* which evidences the transaction, does amount to an admission that the Baghar people had given up all interests in the Simal *thok* and can hardly now claim part ownership in the *sanjait* land therein." That construction may have been the right one or may have been the wrong one; with that we have no concern. We are of opinion that in this particular case both the courts were required to consider instruments of title and documents which were the direct foundation of rights. That being so, we are of opinion that our answer to this reference must be that the Commissioner was right in holding that he was entitled to reverse the judgement and decree of the first appellate court by taking into consideration the evidence on the record on which the first appellate court had come to a contrary conclusion.

Let this answer be returned to the Local Government.

Reference answered.

APPELLATE CIVIL.

1926
April, 27.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.
JADO SINGH AND OTHERS (PLAINTIFFS) v. NATHU
SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Alienation of joint family property—Facts necessary to support alienation of joint ancestral property—“Benefit to the estate”—Sale of unprofitable property and purchase in lieu thereof of property which was a paying investment.

Though it is impossible to give a precise definition of what is such “benefit to the estate” as will support a sale of joint ancestral property, the term may be held to apply to such a transaction as the sale of inconveniently

* First Appeal No. 495 of 1922, from a decree of Rama Das, Subordinate Judge of Saharanpur, dated the 23rd of September, 1922.

situated, incumbered and unprofitable property and the purchase in its stead of other property which was undeniably a sound investment.

Hunooman Persaud Pandey v. Babooee Munraj Koonwaree (1), *Indar Kuar v. Lalta Prasad* (2), *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi* (3), *Sadhu Saran Prasad v. Brahmdeo Prasad* (4), *Tula Ram v. Tulshi Ram* (5) and *Lal Bahadur Lal v. Kamleshar Nath* (6), referred to.

THE facts of this case were as follows :—

One Phul Singh, who, with his two sons Nathu Singh and Arjun Singh, constituted a joint Hindu family purchased certain property under a sale-deed dated the 8th of April, 1897, for a sum of Rs. 4,000. Out of this sum, Rs. 700 remained unpaid, and in lieu of it a bond was executed by Phul Singh on the same date, carrying compound interest at the rate of ten annas per cent. per mensem. On the 9th of July, 1908, Phul Singh executed a mortgage bond in lieu of this document for a sum of Rs. 2,450, being the amount due on the previous bond. After Phul Singh's death, his sons Nathu Singh and Arjun Singh, the fathers of the plaintiffs, executed a hypothecation bond, dated the 15th of June, 1912, in order to raise Rs. 500 to pay off interest due on the previous mortgage, and some cash. On the 16th of October, 1912, the sale-deed in dispute in this case was executed by Nathu Singh and Arjun Singh, Nathu Singh acting also as the guardian of his minor son, Jado Singh, plaintiff No. 1. The sale consideration was Rs. 6,650, out of which Rs. 2,600 were left with the vendees for payment of the two previous mortgages; Rs. 3,530 was stated to be required for the maintenance of the minor and for other expenses; and Rs. 520 as earnest money, etc.

1926

JADO
SINGH
v.
NATHU
SINGH.

(1) (1856) 6 M.I.A., 393 (423).

(2) (1882) I.L.R., 4 All., 532 (543).

(3) (1917) I.L.R., 40 Mad., 709.

(4) (1921) 61 Indian Cases, 20.

(5) (1920) I.L.R., 42 All., 559.

(6) (1925) I.L.R., 48 All., 183.

1926

JADO
SINGH
v.
NATHU
SINGH.

It was in evidence that at the time when this sale took place Nathu Singh and Arjun Singh were actually negotiating for the purchase of zamindari property in their residential village in which they were then mere tenants. Within seven months of the registration of the sale-deed, Nathu Singh and Arjun Singh actually purchased property in their residential village for a sum of Rs. 3,000.

The new purchase was an obviously good investment, having doubled in value in the course of about ten years. Some ten years after the sale above referred to, the minor sons of Nathu Singh and Arjun Singh brought the present suit to have it set aside on the grounds usual in such cases. The trial court found that the transaction was for necessity and for the benefit of the family and had resulted in considerable advantage to it. It also found that the whole of the consideration had been paid. It accordingly dismissed the suit.

The plaintiffs appealed.

Munshi *Shiva Prasad Sinha* (for *Dr. Kailas Nath Katju*), for the appellants.

Dr. Surendra Nath Sen and *Mr. B. Malik*, for the respondents.

THE judgement of the Court (SULAIMAN and BANERJI, JJ.), after stating the facts and the Court's agreement with the finding as to payment of consideration arrived at by the court below, thus continued :

The main argument before us is that even assuming that Rs. 2,600 were for a valid consideration for the alienation, there was no justification to raise a

further sum in order to purchase fresh property, as is alleged by the defendants. That about Rs. 3,000 out of the sale consideration were utilized towards purchasing this fresh property, is fully established by the oral evidence and the circumstances of the case. The learned Subordinate Judge has believed this story and we have no hesitation in agreeing with his view. In fact this point has not been pressed before us very seriously.

What has been strongly urged is that there was under the Hindu law no justification for the fathers of the present plaintiffs to raise money by transferring joint property in order to purchase fresh property. The contention is that such a course amounted to a mere speculation, which was wholly unauthorized. Before we go into the question of law it is necessary to state the circumstances under which the fresh property was acquired.

The plaintiffs' fathers were mere tenants in village Asanwali, and it is only natural to suppose that they must have been very anxious to become zamindars in that village. They had acquired property in 1897 in village Salempur, some two miles from their village, where they had some cultivation. On this property there were mortgage debts carrying interest at $7\frac{1}{2}$ per cent., compounded every year, the amount having accumulated to about Rs. 2,600. For a long number of years they had been unable to pay off this amount and discharge the debt and there seemed to be no prospect of their being able to do so in any way other than by transferring a part of it. The learned Subordinate Judge has found that the creditors were pressing for the payment of this money. In fact the last hypothecation bond was executed in order to pay off some interest on the previous one. A demand for

1926

JADO
SINGH
P.
NATHU
SINGH.

1926

JADO
SINGH
v.
NATHU
SINGH.

further payment of interest was therefore not at all improbable. The Government revenue shown against this property in the sale-deed of 1912 was less than that shown in 1897; this suggests that the property might have deteriorated in quality. The learned Subordinate Judge has found that although the plaintiffs' fathers were good managers and it might be assumed that they were doing their best, they found it difficult to cultivate lands situated not in their residential village but in a village some two miles off. He has further found that it was foresight and prudence on their part to sell the property distantly situated and purchase property in lieu of it nearer home where cultivation could be managed by them at a smaller cost. This was doubly so when the result would be to free themselves from the anxiety of the old debt bearing compound interest which would otherwise go on swelling. He was further satisfied on the oral evidence that the property in Asanwali was the better of the two, both in respect of the quantity of the yield and its price. He has therefore come to the conclusion that the transaction was prudent and beneficial from every point of view. We agree with this view fully. He has further pointed out that as a matter of fact this transaction has proved very beneficial and has resulted in considerable advantage to the family. The property which they purchased for Rs. 3,000 on the 5th of July, 1913, is now worth about Rs. 6,000 and has thus appreciated considerably in value. The plaintiffs along with their fathers are admittedly in possession and in enjoyment of it and they wish to retain it. At the same time they desire that the sale-deed, by means of which money was raised to acquire the property now in their enjoyment, should be set aside so that they may get back the other property also. As we are agreeing with the view of the learned

Subordinate Judge on the facts, we do not think it necessary to discuss all the oral evidence in detail and we content ourselves with stating that we accept these findings as fully justified by the evidence.

1926

JADU
SINGH
v.
NATHU
SINGH.

It has, however, been very strongly contended on behalf of the plaintiffs that even assuming all these findings, the whole transaction cannot be upheld because the plaintiffs' fathers had no authority to transfer joint property in order to raise money to purchase fresh property, and it is urged that under no circumstances can a sale of a joint property in order to acquire fresh property be justified, as it can never be a case of legal necessity. As to the question whether it might not be a transaction for the benefit of the family, the argument that has been pressed before us is that in view of the pronouncements of their Lordships of the Privy Council in the case of *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi* (1), there can be no benefit to the family unless it amounts to a preservation or protection of the family property.

As early as 1856 their Lordships of the Privy Council in the leading case of *Hunooman Persaud Panday v. Babooee Munraj Koonwaree* (2) laid down the law as follows :—

“ The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide lender* is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.”

(1) (1917) I.L.R., 40 Mad., 709. (2) (1856) 6 Moo. I.A., 393 (423).

1926

JADO
SINGH
v.
NATHU
SINGH.

It is quite clear that the benefit to be conferred upon the estate was something distinct from mere need or the pressure upon it. At least this was the view which was accepted by this Court in several cases. We may only refer to the case of *Indar Kuar v. Lalta Prasad* (1). MAHMOOD, J., pointed out that there was a distinction between litigation undertaken to protect the property and litigation the object of which was to obtain a possible benefit for the estate, and then remarked :—

“ As a general rule, the former class of litigation would no doubt amount to legal necessity; and in regard to the latter class of litigation it may be laid down that, if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner, on the analogy of the maxim—he who enjoys the benefit ought to bear the burden also.”

Since then this Court has accepted the view that a transfer of joint property by the manager can be justified if it is not a mere speculation but results in actual benefit to the estate. The other members of the family cannot retain the benefit and at the same time repudiate the transaction by means of which the benefit has been acquired.

We do not think that their Lordships of the Privy Council in the case of *Palaniappa Chetty v. Sreemath Devasikamony Pandara* (2), meant to depart from the view expressed in *Hunooman Persaud's* case. All that their Lordships remarked was that in the reported cases no indication was found as to what is the precise nature of the things to be included under the description “benefit to the estate.” Their Lordships then observed :—

“ It is impossible, their Lordships think, to give a precise definition of it applicable to all cases and they do not attempt

(1) (1882) I.L.R., 4 All., 532 (534). (2) (1917) I.L.R., 40 Mad., 709.

to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

1926

JADO
SINGH
v.
NATHU
SINGH.

The case before their Lordships was one in which a shebait of temple property had granted a lease in perpetuity "solely for the purpose of getting capital to embark on the money-lending business." Their Lordships held that that could not be considered a benefit to the estate. Their Lordships, however, further proceeded to consider whether on facts the transaction was in reality beneficial and came to the conclusion that it was not.

When their Lordships themselves remarked that it was impossible to give a precise definition of "benefit to the estate" applicable to all cases and that they did not attempt to do so, it is difficult to accept the contention of the learned vakil for the plaintiffs that by implication their Lordships meant to confine the scope of the word "benefit" to the cases mentioned by their Lordships as coming *obviously* under that head. Every case has to depend on its particular circumstances and facts. It is impossible to hold that in view of the remark of their Lordships the view of this Court has been altered so as to make it impossible for the manager of the joint Hindu family to transfer property in order to acquire another property in lieu of it. If such were the view, exchanges would be absolutely prohibited and managers would find it impossible to get rid of properties small in extent, distantly situated and difficult to manage, in order to acquire property more beneficial and useful. The case decided by their Lordships of the Privy Council has been a subject of consideration by the Patna High Court in at least two cases which have been brought

1926

JADO
SINGH
v.
NATHU
SINGH.

to our notice, and the view of the Patna Judges certainly is that this case does not overrule the previous decision. We may here refer to *Sadhu Saran Prasad v. Brahmdo Prasad* (1) and *Kalika Nand Singh v. Shiva Nandan Singh* (2).

In the case of *Tula Ram v. Tulshi Ram* (3), it was held that where joint family property had been mortgaged to obtain a loan on the representation that the money was required for the purpose of purchasing certain zamindari property and the purchase was not in fact an unprofitable or improvident transaction but proved beneficial to the family, the debt was incurred for the benefit of the family and was binding on all the members thereof. This was in accordance with the previous view held by this Court. Later on came the case of *Bhagwan Das Naik v. Mahadeo Prasad Pal* (4). At page 393 the learned Judges referred to the case decided by MAHMOOD, J., already quoted by us, and remarked that the mere borrowing of money to pursue litigation, the object of which was to obtain a possible benefit for the estate was held not to be justified under the doctrine of "legal necessity" as known to the Hindu law, *though possibly if the litigation resulted in benefit to the estate, the debt would be binding in accordance with the principle of equity embodied in the maxim quoted*. The learned Judges then referred to the case of their Lordships of the Privy Council and stated that there was nothing in the remarks in that case to encourage the notion that an adventure in the shape of a speculative suit which might possibly bring profit to the estate could possibly be regarded as a "benefit to the state" or a "legal necessity." We agree with this view. It was further remarked that "the observations of their Lordships

(1) (1921) 61 Indian Cases, 20.

(2) (1921) 63 Indian Cases, 625.

(3) (1920) I. L. R., 42 All., 559.

(4) (1923) I. L. R., 45 All., 390.

rather import that any act for which the character of "legal necessity" or "benefit to the estate" can be claimed, must necessarily be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property into possession, and *which may or may not be successful under the chances attending upon litigation.*" It is obvious that the transfer of family property in order to enable the members to embark upon litigation in the hope of acquiring property on the success of uncertain litigation cannot amount to justification. The learned Judges had before them the case of a manager who had made four mortgages and spent the borrowed sums in support of a futile claim for mutation, which ultimately fell, the mortgagee knowing that these sums had been borrowed for the purpose of that litigation. That case therefore has no resemblance to the case before us. In the same way the case of *Shankar Sahai v. Bechu Ram* (1), which was a case where family property was transferred in order to acquire necessary funds to pre-empt other property, is not directly applicable. On the other hand, the case of *Jagmohan Agrahri v. Prag Ahir* (2), decided by a Bench to which LINDSAY, J., who had decided the case in *Bhagwan Das Naik v. Mahadeo Prasad Pal* (3) was a party, goes further than even the present case, for there the disposal of ancestral property by a Hindu father which was inconveniently situated and was not sufficiently profitable, was upheld, though the sale consideration was applied not for the purchase of fresh property but for the extension of the family business, which though not of a speculative nature subsequently failed. On the strength of these authorities we are therefore unable

1926

JADO
SINGH
v.
NATEU
SINGH.

(1) (1925) I.L.R., 47 All., 381. (2) (1925) I.L.R., 47 All., 452.

(3) (1923) I.L.R., 45 All., 390.

1926

JADO
SINGH
v.
NATHU
SINGH.

to hold that in no case can a transfer of joint property made in order to acquire another property in its place be justified. In this particular case we have already referred to various circumstances showing the foresight and prudence of the managers. We might here point out one more important circumstance. At the time of the sale-deed the only male members of the family were Nathu Singh and Arjun Singh and Nathu Singh's minor child Jado Singh. The adult members were the only persons who could judge of the prudence and prospective benefits of the transaction that they were entering into. Nathu Singh not only acted as the manager of the family but also as the guardian of the minor son. These people were in the best position to judge whether the transaction was prudent and beneficial or not. That their judgement was not wrong has been demonstrated by the enormous increase in the value of the property and the actual benefit which has accrued. The plaintiffs have derived full benefit from it and are determined to retain the property. Under these circumstances it seems to us impossible to allow them to get rid of the sale-deed by means of which they were provided with the means by which the unencumbered property which they are retaining was acquired. We have already remarked that a good portion of the amount was utilized for payment of antecedent debts which cannot possibly be avoided by the plaintiffs. Even if any small sum of money out of the large sale consideration had not been required for any legal necessity and was not utilized towards the acquisition of this other property, the sale could not be avoided unless it were shown that the money was not at all paid to the plaintiffs' fathers and that the consideration which was actually paid was not equal to the real value of the property. We might in this connection quote

the recent Full Bench case of *Lal Bahadur Lal v. Kamleshwar Nath* (1). 1926

Having regard to all these circumstances we are of opinion that this appeal must be dismissed. We accordingly dismiss it with costs.

JADO
SINGH
v.
NATHU
SINGH.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Sulaiman.

EMPEROR *v.* MAHTAB RAI AND ANOTHER.*

Act No. XLV of 1860 (Indian Penal Code), section 251—1925
December,
9.
Tendering to a bank for exchange coins which had been used as ornaments and from which the solder had been imperfectly removed and coins which had been reduced in weight otherwise than by legitimate wear—Knowledge of tenderers.

Two persons, who carried on a business as dealers in coins at Delhi, came to Moradabad on the 24th of May, 1925, (on which date, being a Sunday, the Bank was closed) and obtained an introduction to the cashier of the local branch of the Imperial Bank. They had with them a large number of coins, and they offered to the cashier a commission of 3 per cent. if he would change them. On further examination of these coins at the Bank the next day, the Bank officials sent for the police and the two dealers were arrested. The coins which they had brought were sent for examination to the Calcutta Mint. The report of the Mint expert, which was duly proved at the trial, showed that a considerable number of the coins tendered were old and worn coins which had been used at one time as ornaments and from which the solder had only been partially removed in order to keep up their weight, whilst many more were coins of recent date which were not much worn but had been carefully subjected to a process of clipping or filing so as to reduce their weight to the lowest limit of wastage allowable under the law.

* Criminal Revision No. 600 of 1925, from an order of H. Beatty, Sessions Judge of Moradabad.

(1) (1925) I.L.R., 48 All., 183.

1925
EMPEROR
v.
MAHTAB
RAI.

Held that the persons who had tried to get these coins changed were rightly convicted under section 251 of the Indian Penal Code.

THIS was an application in revision against an order of the Sessions Judge of Moradabad. The facts of the case are fully stated in the judgement of the Court.

Sir *C. Ross Alston* and Mr. *A. P. Dube*, for the applicants.

The Assistant Government Advocate (*Dr. M. Waliullah*), for the Crown.

SULAIMAN, J.—This is a criminal revision from a conviction under section 251 of the Indian Penal Code. It appears that on the 24th of May, 1925, the two accused, Mahtab Rai and Ram Sarup, arrived at Moradabad and through the help of a broker Ram Krishan were introduced to Rang Bihari Lal, the cashier of the Moradabad Branch of the Imperial Bank. They showed him some samples of defaced coins and requested him to cash next day when the Bank would open. Rang Bihari Lal was reluctant to accept those coins and said that he would consult other clerks of the Bank before giving his final opinion. The accused left some coins by way of sample with Rang Bihari Lal and promised to return at about 3 p.m. in the afternoon. Rang Bihari Lal approached another officer of the Bank named Manohar Lal, who came to the conclusion that the coins could not be taken by the Bank. The police were informed and some police officers came and concealed themselves in the house of Rang Bihari Lal and lay in wait for the arrival of the accused. At about the appointed time the accused arrived with bags full of coins about Rs. 2,000 in face value. Rang Bihari

Lal after examining the coins expressed his willingness to accept about 300 one rupee pieces and 100 eight anna pieces and offered to pay only Rs. 250. While the coins were lying before them and were being counted, the police officers came out and arrested the accused and took possession of all the coins. An Inspector was sent to Delhi, the place of residence of the accused, and on a search of their house, a large number of implements, e.g., 10 files, 4 shears, 36 chisels and 3 hammers, and a tin case containing clippings and some filings were found inside an iron safe along with a large quantity of defaced coins.

The accused did not deny their possession of these coins, which were sent to an officer of the Calcutta Mint for an examination and report. Mr. Hart, an officer employed at the Calcutta Mint, was examined as a witness to prove his report. According to his classification the coins were of three main samples. Sample No. 1 were coins where no drastic attempt had been made to remove solder owing to the considerable wearage of the coins. These coins however were such as could have been received by Government at a reduced valuation. Sample No. 2 were coins which had not worn much but on which cutting had been done intentionally, which the expert thought amounted to a fraudulent treatment. Sample No. 3 were coins where the cutting and clipping had been practised to an extreme limit. These coins showed little or no wearage and were of recent dates. The weights of these coins however were remarkably close to the extreme limit of wearage prescribed, from which fact the expert presumed that scales must have been used in achieving this result.

The courts below have examined the coins and agree with the report of the expert that these coins are such as had been dishonestly and fraudulently

1925

EMPEROR
F.
MAHTAB
RAI.

1925
EMPEROR
v.
MAHTAB
RAI.

operated upon within the meaning of section 247 and that the accused persons were knowingly in possession of the same and had attempted to induce Rang Bihari Lal to receive the same and were accordingly guilty of the offence under section 251 of the Indian Penal Code.

Three main points have been urged before me.

The first is that as a matter of fact these coins have lost in weight owing to wearage and have not been actually defaced and are not coins which have been fraudulently or dishonestly operated upon.

The second is that the accused were in possession of these coins, which were in the form of ornaments, honestly and in the course of their ordinary business and did not knowingly possess them as dishonestly or fraudulently defaced coins within the meaning of section 251 of the Indian Penal Code.

The third is that no offence under section 251 was committed inasmuch as the coins had been transformed into ornaments and any clipping or cutting that was done was performed on ornaments as such and not on coins.

As regards the question of fact I must in revision accept the findings of the courts below based on expert evidence that a large number of the coins found in the possession of the accused had been defaced and had lost in weight not due to wearage but because of cutting and clipping.

In order further to satisfy myself I have examined a large number of these coins and there is no doubt in my mind also that a number of these coins have been clipped and cut even at places where there was no soldering. Many of these coins show edges where portions have been cut away in straight lines as if they have been filed away. The circumstance

that the weights of all the coins in sample No. 3 are remarkably close to the extreme limit of wearage prescribed, does show that their weights were reduced deliberately to that extent after careful weighing.

1925

EMPEROR
v.
MAHTAB
RAI.

As to whether the accused were in possession of these coins knowing that they were so defaced, the view of the courts below is supported by all the circumstances of the case. The conduct of the accused themselves fully bears out the conclusion. In the first place they admit that they carry on the business of collecting such coins and ultimately change them at the various offices of the Imperial Bank. Under these circumstances it is only natural to suppose that they would take care to examine the coins which they receive and would make sure that they are such as can be exchanged at the Bank. Then again there is the fact that they suddenly arrived at Moradabad on a holiday and the first thing they did was to obtain an introduction to the cashier and to offer him a commission of 3 per cent. in case he accepted the coins. If they were carrying on their business in a straightforward and honest way, one would have expected them to visit Moradabad on a day when the Bank was open and to go straight to the Bank and tender the coins. The tortuous way adopted by them provided ample material for the courts below to infer that they were not dealing in this matter honestly. Furthermore, the very appearance of the coins is such as would make any one who was in possession of them know that they had been cut, clipped or filed intentionally.

The third point is that no offence is committed when a coin, which has ceased to be used as money and which has been transformed into an ornament, has been defaced. It is not disputed that the word

1925
EMPEROR
v.
MAHTAB
RAI.

“deface,” as defined in section 2(a) of Act III of 1906, includes clipping, filing, stamping or such other alteration of the surface or shape of a coin as is readily distinguishable from the effects of reasonable wear. As to fraud or dishonesty, the contention is that the intention of the legislature, in making the possession of such a coin or the intention to deliver it an offence, is to punish persons who have defaced coins which are capable of being used as money. The argument is that if a coin has been transformed into an ornament, then no offence is committed if that ornament is further cut away or clipped. This argument is sought to be supported by rules Nos. 65 to 69 of the Resource Manual, under which provision has been made for accepting defaced coins, provided that they have not lost in weight below a certain prescribed minimum. Great stress is laid on rule 69 which provides that when a silver coin which has been fraudulently defaced is tendered to any person mentioned in article 57, such person shall cut or break the coin and return the cut coin to the tenderer, who shall bear the loss caused by such cutting or breaking. It is, therefore, argued that the only penalty to which a person is subject is that he has to bear the loss caused by a fraudulent defacing of a coin. But any rule prescribed by Government under which Bank officers are directed to accept or return defaced coins can in no way take away the effect of the provisions of sections in the Indian Penal Code. It is impossible to construe a section of the Indian Penal Code in the light of the provisions of the rules in the Resource Manual. These rules do not deal with any criminal liability which is provided for in the Indian Penal Code. They contain provisions under which, if the conditions required by the rules are fulfilled, coins can be exchanged.

I have, therefore, to consider whether the intention of the legislature is that possession of only such coins as have not been already altered or transformed is prohibited under section 251. Section 230 defines a Queen's coin and expressly states that the metal which has been so stamped and issued shall continue to be the Queen's coin for the purposes of that Chapter, notwithstanding that *it may have ceased to be used as money*. Now a coin may have ceased to be used as money in various ways. It may, for instance, be a coin which has been superseded, or it may pass into territories of some independent chief where it is not accepted as legal tender, or it may be that it has been defaced so badly that no one would accept it as a current coin. But it may still, within the meaning of section 230, be deemed to be a Queen's coin even though it has ceased to be used as money. Furthermore, the mere fact that a coin is being used as an ornament by soldering a ring to it does not transform it absolutely into a new article. By removal of that ring the coin in a defaced form will re-appear and may be capable of being accepted by ignorant villagers. The rules in the Resource Manual themselves require that a person who wants to have these defaced coins exchanged must at his own cost remove the solder and then tender the coins. The rules speak of a silver coin which has been defaced. It is obvious, therefore, that when these coins are tendered to a Bank they are not tendered as ornaments or other articles into which coins have been transformed, but are tendered as coins which have been defaced. If therefore an accused person clips and cuts away a coin and makes up the deficient weight by solder, with the intention of subsequently delivering it to a Bank, he would certainly be guilty of fraudulently defacing a coin even though on previous occasion the coin had

1925

EMPEROR
V.
MAHTAB
RAI.

1925
EMPEROR
v.
MAHTAB
RAI.

been used as a wearing ornament. It is contended on behalf of the accused that there was really no fraud in their mind and that they did not intend to commit any fraud on the Bank. It is said that the amount of money to be paid to them would be according to the reduced weight of the coins and that if they cut away a greater portion they would receive a smaller amount, and in case they reduced the weight beyond the limit prescribed they would themselves have to bear the loss. This argument loses sight of the fact that coins which have been used as ornaments are purchased cheap in the market and then the person who cuts away a portion of them retains in his possession a part of the silver so cut away and yet gets price for the remainder from the Bank by adding solder to bring the weight up to the required figure. The whole transaction therefore is a very profitable one, because they were able to procure these coins at a very cheap price and have also substituted solder for silver. The word "dishonestly" which occurs in section 247 has been defined in section 24 as follows:—"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly." Now the Banks are not authorized to accept coins which have been fraudulently defaced. If, therefore, a person intentionally defaces a coin and conceals this fact from the Bank in order to persuade the Bank to accept the coin, he has the intention of causing wrongful gain to himself, even though the Bank may not be put to a wrongful loss inasmuch as it has to pay price according to the present weight of the coin. But there would be a wrongful loss to the Bank if some silver has been taken away by cutting, clipping or filing and the weight is brought up to the required minimum

by soldering. In my opinion, therefore, it is impossible to hold that the conviction of the accused persons under section 251 of the Indian Penal Code was in any way illegal or improper.

Application dismissed.

APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Lindsay.*

GOKUL KALWAR (DEFENDANT) v. CHANDAR SEKHAR
AND OTHERS (PLAINTIFFS) AND MAHADEO KALWAR
(DEFENDANT).*

*Act No. IV of 1882 (Transfer of Property Act), section 83—
Invalid deposit—Deposit made when one of the mort-
gagees is a minor and not represented by a guardian ad
litem—Mesne profits—Mortgage redeemable only in
fallow season—Preliminary and final decrees—Appeal.*

Held that a deposit of mortgage money purporting to be made under section 83 of the Transfer of Property Act, 1882, is not a valid deposit if at the time it is made one of the mortgagees, being a minor, is not represented by a properly constituted guardian ad litem. *Kannu Mal v. Indarpal Singh* (1), followed.

Held also that in the case of a usufructuary mortgage redeemable during the fallow season it is for the mortgagor to do everything that is necessary to enable the mortgagee to vacate possession during that particular season. If this is not done, the mortgagee is entitled to remain in possession until the next fallow season, and, being thus lawfully in possession, is not liable for mesne profits.

Held further that where, pending an appeal from the preliminary decree in a mortgage suit, a final decree is passed and an appeal from that decree is dismissed for want of prosecution, it is still open to the Court to proceed with the appeal against the preliminary decree. *Kanhaiya Lal v. Tirbeni Sahai* (2), followed.

* First Appeal No. 450 of 1922, from a decree of Charu Deb Banerji, Subordinate Judge of Gorakhpur, dated the 5th of October, 1922.

(1) (1922) I.L.R., 45 All., 273. (2) (1914) I.L.R., 36 All., 532.

1925

EMPEROR

v.

MAHTAB

RAI.

1926

March,

30.

1926

GOKUL
KALWAR
v.
CHANDAR
SEKHAR.

THE facts of this case are fully stated in the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the appellant.

Mr. *B. E. O'Connor* and Mr. *Sankar Saran*, for the respondents.

MEARS, C. J. and LINDSAY, J.—This appeal is directed against a preliminary decree passed in the court of the Subordinate Judge of Gorakhpur in a suit for redemption. The plaint is dated the 15th of September, 1916, and the suit was suit No. 7 of 1917. It seems that the suit was dismissed originally in the court of first instance. There was an appeal to this Court and the case was sent back for disposal on the merits, and finally the Subordinate Judge gave judgement on the 5th of October, 1922, allowing redemption.

In framing their suit for redemption the plaintiffs mortgagors asked for mesne profits for two periods :

(1) from the date of a certain deposit which they had made in court under section 83 of the Transfer of Property Act till the date of the suit; and

(2) from the date of the suit till the date of delivery of possession.

The Subordinate Judge was of opinion that the plaintiffs were not entitled to mesne profits for the first period and he based his decision on the ground that the deposit which the plaintiffs had made was not a proper deposit. At the time that deposit was made one of the mortgagees was a minor, and when the plaintiffs lodged the money in court there was no properly constituted guardian *ad litem* of this mortgagee defendant. The learned Subordinate Judge, therefore, held that this was not a good deposit so

as to stop the running of interest and he relied for his decision upon a judgement of this Court in *Kannu Mal v. Indarpal Singh* (1). That case afterwards came up before a Bench in Letters Patent (2), in which the law was affirmed as followed by the learned Subordinate Judge. It must be taken, therefore, that there was, before the date on which the suit was brought, no valid deposit of the mortgage money under section 83 of the Transfer of Property Act.

We are, however, unable to understand why after coming to this finding, the learned Subordinate Judge allowed mesne profits to the plaintiffs from the date of the suit till the date of delivery of possession.

The judgement of the Subordinate Judge was delivered on the 5th of October, 1922, and by the decree, which was prepared on the 13th of October, 1922, the defendants mortgagees were ordered to vacate possession in favour of the plaintiffs on or before the 5th of March, 1923. As a matter of fact, the plaintiffs got possession either on the 26th or 28th of October, 1922. The question is whether the Subordinate Judge was justified, in this preliminary decree, in giving a direction that the plaintiffs should receive mesne profits from the date of the suit till the date of delivery of possession. If the defendants mortgagees could not be said to have had wrongful possession during this latter period, they were certainly not liable to pay mesne profits to the plaintiffs.

This question, as to whether the defendants were in wrongful possession or not, must be determined on the terms of the mortgage in their favour. It is clear that this mortgage was one of those possessory mortgages in which the defendants were only liable to surrender possession if everything was done by the

(1) (1921) I.L.R., 44 All., 102. (2) (1922) I.L.R., 45 All., 273.

1926

GOKUL
KALWAR
v.
CHANDAR
SEKHAR.

1926

GOKUL
KALWAR
v.
CHANDAR
SEKHAR.

mortgagors to discharge the mortgage debt by Jeth Sudi Puranmashi. In a mortgage of this kind the mortgagee can only be called upon to vacate possession in favour of the mortgagors if all steps necessary to redemption have been taken so as to enable the mortgagee to vacate possession in the fallow season of Jeth. It follows, therefore, that if in one particular year the mortgagors fail to take all the necessary steps to obtain redemption in the fallow season, the mortgagee is entitled, under the terms of the mortgage, to remain in possession till the fallow season of the following year, and it could not, therefore, be said that where the plaintiffs have made default in taking proceedings for redemption in one year the mortgagee is, for the year which follows, in wrongful possession. On the contrary, he is in possession in strict accordance with the terms of the mortgage contract.

And so in the present case we are unable to see how it can be said that these mortgagees were in wrongful possession from the date of the suit up till the date of delivery of possession. Before the suit was brought no proper and effective steps had been taken by the mortgagors to obtain redemption in the fallow season of Jeth. We are, therefore, of opinion that the direction in the preliminary decree, awarding mesne profits from the date of the suit till the date of delivery of possession, was erroneous.

It now appears that, since the passing of this preliminary decree in the court below and since the date of the filing of this appeal (No. 450 of 1922) a final decree was prepared in the court of the Subordinate Judge of Gorakhpur. This was drawn up on the 28th of April, 1924. The Subordinate Judge by that final decree awarded a sum of Rs. 8,000 odd by way of mesne profits to the plaintiffs. Against this final

decree the present defendant appellant, Gokul Kalwar, filed a First Appeal, No. 103 of 1925, objecting to the award of these mesne profits. That appeal, however, was dismissed several months ago for want of prosecution, the reason being that the appellant had failed to deposit the necessary translation and printing charges.

It was suggested before us that the result of the dismissal of the plaintiffs' appeal, F. A. No. 103 of 1925, was that we were not at liberty any longer to deal with this appeal (No. 450 of 1922) directed against the preliminary decree. It was argued that the final decree in the mortgage suit had become final as between the parties and that we are not now in a position to pass any decree which would be inconsistent with that final decree. We think, however, this argument must be rejected in view of the ruling of the Full Bench of this Court in *Kanhaiya Lal v. Tirbeni Sahai* (1).

The result of all this is that we hold that the preliminary decree was wrong in allowing mesne profits from the date of suit till the date of delivery of possession and we vary that preliminary decree accordingly.

Appeal allowed.

1926

GOKUL
KALWAR
v.
CHANDAB
SEKHAR.

(1) (1914) I.L.R., 36 All., 532.

1926
May, 7.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

QUDRAT-UN-NISSA BIBI (DEFENDANT) *v.* ABDUL RASHID AND ANOTHER (PLAINTIFFS) AND HUSAIN ALI (DEFENDANT).*

Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 19 and 20—Pre-emption—Defendant vendee becoming a co-sharer during pendency of suit—Appeal—Withdrawal of pre-emption money after filing appeal no bar to its continuance.

Alike under the Agra Pre-emption Act, 1922, and under the law which subsisted just before that Act was passed, a right of pre-emption must subsist up to the time when the decree is passed. Where, therefore, a defendant vendee, by reason of a gift made during the pendency of the suit, finds himself in a position to defeat the plaintiff's claim, there is no bar to his setting up the gift as a defence. *Bihari Lal v. Mohan Singh* (1), and *Baldeo Misir v. Ram Lagan Shukul* (2), referred to.

Held also, that a defendant vendee is not prevented from prosecuting an appeal by reason of the fact that he has taken out the pre-emptive price deposited in court by the pre-emptor in accordance with the terms of the decree in his favour. *Iftikhar Ali v. Thakur Singh* (3) and *Sundar Das v. Dhanpat Rai* (4), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Mr. Zafar Mehdi and Maulvi Haidar Mehdi, for the appellant.

Maulvi Mukhtar Ahmad, for the respondents.

SULAIMAN and BANERJI, JJ. :—This is a defendant's appeal arising out of a suit for pre-emption. On the 23rd of November, 1923, the sale sought to be pre-empted took place. The case is accordingly governed by the new Pre-emption Act of 1922, which

* First Appeal No. 154 of 1925, from an order of Gauri Prasad, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 22nd of July, 1925.

(1) (1920) I.L.R., 42 All., 268.

(2) (1923) I.L.R., 45 All., 709.

(3) (1912) 15 Indian Cases, 347.

(4) (1907) P. R., 16.

came into force on the 17th of February, 1923. The suit for pre-emption was filed on the 22nd of November, 1924. While that suit was pending in the first court, the defendant obtained a deed of gift on the 8th of April, 1925, of another share in the property in the same mahal, and pleaded that the plaintiff had actually lost his right of preference over her. The court of first instance held that under section 19 of the Agra Pre-emption Act the plaintiff had lost his right, and accordingly dismissed the suit. On appeal, the appellate court has taken a contrary view. It has come to the conclusion that the interpretation of sections 19 and 20 of the Agra Pre-emption Act is that the defendant cannot resist the plaintiff's claim unless she had acquired an indefeasible right in the mahal prior to the suit. On the question of fact the appellate court has recorded a clear and categorical finding that the transaction of the 8th of April, 1925, was in reality a gift in its nature and not a sale. This finding must be accepted.

The question that we have to consider is whether by virtue of having obtained a share in the village by gift during the pendency of suit and before the decree, the defendant vendee can defeat the plaintiff.

Undoubtedly, before the Pre-emption Act was passed, the law as interpreted by the Special Pre-emption Bench was that the plaintiff must have a subsisting right of pre-emption not only on the date of the sale and the date of the suit, but also at the time of the decree. The result used to be that if, prior to the passing of the decree, the defendant acquired an interest by way of gift, which put him on an equal footing with the plaintiff, the suit could not be decreed. We may refer to the case of *Bihari Lal v. Mohan Singh* (1). As the whole object of the

1925

QUDRAT-UN-
NISSA
BIEI
v.
ABDUL
RASHID.

(1) (1920) I.L.R., 42 All., 268.

1926

QUDRAT-UN-
NISSA
BIBI
v.
ABDUL
RASHID.

constitution of the Special Bench had been to ensure a uniformity of decisions, the principle that the last crucial date was the date of the first court's decree was followed in the case of *Baldeo Misir v. Ram Lagan Shukul* (1), though one of us there pointed out that "a possible view to take might have been that nothing which happens after the institution of a suit can alter the position of the parties."

That, however, was not a case of an acquisition of another interest by the vendee but of a loss of right by the plaintiff after the decree. The question before us is whether the law as laid down in *Bihari Lal's* case has been altered by the new Act.

No doubt sections 19 and 20 are not as clear as they might have been, but we have no doubt that the law as interpreted just before the Act was never intended to be altered. It is contended that section 20 permits a defence only when, prior to the institution of the suit, a purchaser has transferred property or has acquired an indefeasible interest in the mahal. The language of section 20, when examined according to its grammatical construction, does not bear this out. The expression "prior to the institution of such suit" follows after the word "has" in the first portion, and therefore cannot be deemed to be understood after the word "or" and *before* the words "has acquired" in the second portion. Had the latter portion been "or acquired" instead of "or has acquired", a different conclusion might have followed. We must look at the language of the section itself and ignore the marginal note. On that language, there is no justification for confining the second portion to a contingency prior to the suit. It is argued on behalf of the respondent that by implication section 20 means

(1) (1923) I.L.R., 45 All., 709.

that in every case of an acquisition by the defendant of an interest other than an acquisition prior to the suit, the defence will not succeed. To accept this contention would be to introduce new words into the section which are not to be found there.

1926

QUDRAT-UN-
NISSA
BIKH
v.
ABDUL
RASHID.

Even if section 20 does not govern the case, then that section would certainly be silent as to the acquisition after the suit. On the other hand, section 19 undoubtedly deals with the stage when the decree is about to be passed. If by that time the plaintiff has no longer a subsisting right of pre-emption, he cannot get a decree. The words "right of pre-emption" are used in a technical sense in this Act and have been defined in section 4, sub-clause 9. In that sub-clause, a right of pre-emption means a right of a person on a transfer of immovable property to be substituted in place of the transferee by reason of such right. If, leaving out the unnecessary words, we were to substitute the equivalent of the expression "right of pre-emption" in section 19, that section would read somewhat as follows:—

"No decree of pre-emption shall be passed in favour of any person, unless he has a subsisting right to be substituted in place of the transferee at the time of the decree, etc., etc."

Once this section is read in this light, it leaves no doubt that the plaintiff's right to be substituted in place of the transferee must subsist at the time when the decree is to be passed. Now the right of substitution may be lost in several ways. It may either be lost owing to the loss of plaintiff's interest in the mahal or owing to the change in the status of the defendant. But in either case no decree can be passed in favour of the plaintiff, unless he has a subsisting right to be substituted in place of the vendee at the time when the decree is to be passed.